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POMEROY'S
EQUITY JURISPRUDENCE
AND
EQUITABLE REMEDIES

SIX VOLUMES.

POMEROY'S
EQUITY JURISPRUDENCE,

IN FOUR VOLUMES.

BY JOHN NORTON POMEROY, LL.D.

THIRD EDITION, ANNOTATED AND MUCH ENLARGED,

AND SUPPLEMENTED BY

A TREATISE ON EQUITABLE REMEDIES,

IN TWO VOLUMES.

BY JOHN NORTON POMEROY, JR.

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
LAW PUBLISHERS AND LAW BOOKSELLERS.
1905.

A TREATISE

ON

EQUITY JURISPRUDENCE,

AS ADMINISTERED IN

THE UNITED STATES OF AMERICA;

ADAPTED FOR ALL THE STATES,

AND

TO THE UNION OF LEGAL AND EQUITABLE REMEDIES
UNDER THE REFORMED PROCEDURE.

BY JOHN NORTON POMEROY, LL.D.

THIRD EDITION,

BY

JOHN NORTON POMEROY, JR., A.M., LL.B.

IN FOUR VOLUMES.

VOL. I.

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
LAW PUBLISHERS AND LAW BOOKSELLERS.
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TO

STEPHEN J. FIELD, LL.D.,

ONE OF THE ASSOCIATE JUSTICES OF THE SUPREME COURT
OF THE UNITED STATES:

NOT ONLY AS A TRIBUTE TO HIS EMINENT PUBLIC SERVICES IN THE MOST AUGUST
TRIBUNAL OF ANY MODERN NATION, BUT ALSO AS AN ACKNOWLEDGMENT OF HIS PRIVATE FRIENDSHIP, AND OF THE
AUTHOR'S ESTEEM AND RESPECT,

THIS WORK IS DEDICATED.

PREFACE TO THE THIRD EDITION.

An edition of a standard text-book in double the number of volumes of the first edition appears to call for some explanation, if not apology. The motives which induced the present editor to add to his father's work, by way of an attempt to carry out and complete the original scheme of that work, the two volumes on "Equitable Remedies", are stated in the preface to those volumes. It was found, when the editing of the remaining parts of the work was taken up, that an adequate statement of the twelve years' growth of their many topics would swell the three volumes, already bulky, to an inconvenient size; and it further appeared that in a large range of these topics a treatment less general and elementary than the author's limits of space allowed would more truly represent their present relative importance. The editor has therefore,—while supplying all portions of the book with citations much more numerous than those added in the second edition,—undertaken to annotate at considerable length, drawing upon the older as well as the latest cases, such subjects as, e. g. the Equity Jurisdiction of the United States Courts; many topics in the chapters on Notice, Priorities, and Bona Fide Purchase; and many in the law of Trusts. The subject of the Jurisdiction to avoid Multiplicity of Suits, which the author was the first to treat in a manner and to an extent adequate to its intrinsic importance, has had an astonishing growth under the impetus given by his well known chapter; in presenting, in some detail, the result of this growth, the editor has ventured to add two paragraphs (§§ 251½, 251¾) to the text, for the purpose of emphasizing and illustrating an important limiting principle, which had, indeed, been recognized by the author, but has only come into prominence in recent years. With this one exception no new paragraphs have been interpolated; the author's text and notes have been left as they were written, the editor believing that the peculiarly authoritative character conceded by the courts to that text required that no chance should be afforded of confusing the author's language with his own. The results of the editor's labor — which has included a careful re-examination of all the cases added in the second edition, — have, therefore, been cast into a series of separate notes, distinguished from the author's notes by reference letters instead of numerals. The reader's attention has been called to several thousands of cases citing or quoting the text; from the number of these some notion may be obtained of the extent to which the author's statements have been accepted as authority.

An editorial task involving the reading of tens of thousands of cases can rarely be accomplished single handed. The editor desires to acknowledge his indebtedness to his painstaking assistants, Mr. F. W. Doan, now of Tucson, Ariz., and Mr. E. S. Page, of Oakland, Cal. The chapter on Trusts (excepting Charitable Trusts) was for the most part annotated by Mr. Doan; as to the rest of the editorial notes, it may be said in general that those in Vol. III are chiefly Mr. Page's work, those in Vols. I and II, and all those stating the results of English cases, are chiefly the editor's.

Pomeroy's Equity Jurisprudence was written at a fortunate time,— a time almost coincident with the completion of the labors of Jessel and others of that brilliant group of English Chancery Judges of the seventh and eighth decades of the last century, whose restatements of the doctrines and principles of Equity amounted almost to a re-creation. It is hardly too much to say, that the author accomplished the same result for large parts of the equity jurisprudence in this country. Few law books in any field have been relied on by American Courts in the last twenty years with anything like the same frequency. The instances are rare in which the author's conclusions on debatable questions have not been accepted, almost without dispute. The hope earnestly expressed in his preface, that his work "may maintain the equity jurisprudence in its true position as a constituent part of the municipal law" appears to have been abundantly fulfilled.

J. N. P., Jr.

San Francisco, March, 1905.

PREFACE TO THE SECOND EDITION.

THE author of this treatise departed this life so soon after the publication of the first edition, that he had no opportunity to do anything in the way of preparation for this edition. By a testamentary request, he charged that work upon the present editors. This duty the editors, with filial reverence, have performed to the best of their ability, and now submit the result of their labors to the profession.

In the preparation of this edition, a careful examination has been made of all the cases — English and American — which have appeared since the publication of the first edition, involving matters falling within the scope of this work. These cases are upwards of eight thousand in number. In gathering this large mass of material, the editors have not, in any instance, made use of the often fallible assistance of the digests, but have gone directly to the reports. A considerable proportion of the material thus gathered has, of course, been discarded, as involving merely the enunciation of familiar doctrines; but the nearly universal desire among members of the legal profession to be guided by the latest authority has generally been respected. While it has not been found necessary or desirable to add to or alter the text, except for the purpose of correcting a few typographical errors, the editors have not confined their labors to the mere enumeration of recent decisions. Without attempting to enlarge the general scope of the work, whose contents are so well known, it has been found possible to give a treatment considerably more in detail of many important topics. It is also hoped that the insertion of numerous cross-references will prove to be a material convenience in the use of the book. In order that those who make use of this edition may be able to distinguish between the work of the author and that of the present editors, all the new matter inserted in this edition has been inclosed within brackets.

In submitting this result of their labors to the legal profession, the editors desire to express the hope that they will be found to have done nothing to impair the original character of their father's work, or to lower the high place which it has found in the estimation of the Bench and Bar.

C. P. POMEROY.
J. N. P., JR.

SAN FRANCISCO, April, 1892.

PREFACE.

THE author herewith submits to the legal profession a text-book which treats, in a somewhat comprehensive manner, of the equitable jurisdiction as it is now held by the national and state tribunals, and of the equitable jurisprudence as it is now administered by the courts of the United States, and of all those states in which the principles of equity, originally formulated by the English Court of Chancery, have been adopted and incorporated into the municipal law. It is proper that he should, in a few words, explain the motives which led to the preparation of such a work, and describe the plan which he has pursued in its composition.

While the supreme court of judicature act was pending before the British Parliament, there appeared in the Saturday Review a series of articles written by one of the ablest lawyers and most profound thinkers of the English bar, which pointed out a grave danger threatening the jurisprudence of England in the plan, as then proposed, for combining legal and equitable rights and remedies in the same action, and administering them by the same tribunal. The writer showed, as the inevitable result of the system, that equitable principles and doctrines would gradually be suppressed and disappear in the administration of justice; that they would gradually be displaced and supplanted by the more inflexible and arbitrary rules of the law; until in time equity would practically cease to be a distinctive branch of the national jurisprudence.[1] The reasoning of these remarkable articles was so cogent and convincing that it produced a deep impression, not only upon the English bench and bar, but even upon Parliament, and it ultimately led to an amendment of the act by the addition of the following clause, which has undoubtedly averted the anticipated danger: "Generally, in all matters in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail."

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[1] The reality of the danger, and the importance of the legislative enactment by which it was averted, are most unmistakably shown in the current series of English reports. Able common-law judges, taking a part in the decision of equity causes, are frequently represented as attacking, and even denouncing, equitable principles and doctrines which have for centuries been treated by the court of chancery as fundamental and elementary,— principles which have been most fruitful in results, and have been applied in numberless forms to the equity jurisprudence. Can there be a doubt that equity, exposed to such judicial attacks from members of the highest court, would gradually have succumbed, and finally ceased to be a distinctive part of the English municipal law?

I have referred to this incident simply for the purpose of indicating its application, under like circumstances, to the law of our own country. The arguments of the English essayist were purely *a priori,* and were confined to the judicial system of England. They would apply with equal force to a large portion of the American states; and the correctness of his conclusions is established by the judicial experience of those commonwealths during the past thirty years. Since the first New York Code of Practice in 1848, about one half of the states and territories have adopted the Reformed Procedure. As the central conception of this system is the abolition of all external distinctions between actions at law and suits in equity, the union of legal and equitable rights and remedies in one proceeding, and the substitution of many important equitable in place of legal methods, it was confidently supposed that in progress of time the doctrines of equity would obtain a supremacy over those of the law in the administration of justice, and that the entire jurisprudence of a state would gradually become more equitable, more informed with equitable notions. It must be confessed, I think, that the experience of the past thirty years in these states points to a directly contrary result. Every careful observer must admit that in all the states which have adopted the Reformed Procedure there has been, to a greater or less degree, a weakening, decrease, or disregard of equitable principles in the administration of justice. I would not be misunderstood. There has not, of course, been any conscious intentional abrogation or rejection of equity on the part of the courts. The tendency, however, has plainly and steadily been towards the giving an undue prominence and superiority to purely legal rules, and the ignoring, forgetting, or suppression of equitable notions. The correctness of this conclusion cannot be questioned nor doubted; the consenting testimony of able lawyers who have practiced under both systems corroborates it; and no one can study the current series of state reports without perceiving and acknowledging its truth. In short, the principles, doctrines, and rules of equity are certainly disappearing from the municipal law of a large number of the states, and this deterioration will go on until it is checked either by a legislative enactment, or by a general revival of the study of equity throughout the ranks of the legal profession.

I would not be understood as condemning the Reformed Procedure on this account. The tendency which I have mentioned may be checked; the danger is incidental, and can easily be prevented. A brief legislative enactment, substantially the same as that added to the English Judicature Act, would render the system perfect in theory, and would secure to equity the life and prominence which properly belong to it, and which should be preserved. The state of Connecticut has incorporated the clause into its recent reformatory legislation; that it should not have been added to all the Codes of Procedure is very surprising.

I need not dwell upon the disastrous consequences of the tendency above described, if it should go on to its final stage. Even a partial loss of equity would be a fatal injury to the jurisprudence of a state. So far as equitable rules differ from those of the law, they are confessedly more just and righteous, and their disappearance would be a long step backward in the progress of civilization.

It is of vital importance, therefore, that a treatise on equity for the use of the American bar should be adapted to the existing condition of jurisprudence throughout so large a part of the United States. It should be based upon, and should present in the clearest light, those principles which lie at the foundation of equity, and which are the sources of its doctrines and rules. In this respect, the plan of the present work was deliberately chosen, and has been steadily pursued, even when it has led to amplifications which might, perhaps, be regarded by some readers as unnecessary. It has been my constant endeavor to present the great underlying principles which sustain the whole superstructure of equity, and to discuss, explain, and illustrate them in the most complete manner. Some of these principles are so comprehensive and fruitful, that one who has grasped them in their fullness of conception has already mastered the system of equity; all else is the mere application of these grand truths to particular circumstances.

Such a treatise, designed for the American profession, if it would at all meet and satisfy the needs of the bench and bar, must also be based upon and adapted to the equitable jurisdiction which is actually possessed by the state and national courts, and the equitable jurisprudence which is actually administered by them. It must recognize the existing condition, both of law and equity, the limitations upon the chancery jurisdiction resulting from varying statutes, and the alterations made by American legislation, institutions, and social habits. Many departments of equity, many doctrines and modes of applying the jurisdiction which were important at an earlier day, and are perhaps still prominent in England, have become practically obsolete in this country; while others have risen in consequence, and are constantly occupying the attention of the courts. It has been my purpose and endeavor to discuss and describe the equity jurisprudence as viewed in this light, and to present the actual system which is now administered by the courts of the United States and of all the states. As an illustration, I have attempted to ascertain and determine the amount of jurisdiction held by the different state tribunals, as limited and defined by statutes, and established by judicial interpretation; and have not confined the treatment of this subject to a mere account of the general jurisdiction possessed by the English Court of Chancery. It is true that the fundamental principles are the same as those which were developed through the past centuries by the English chancery; but the application of these principles, and the particular rules which have been deduced from them, have been shaped and determined by the modern American national life, and have received the impress of the American national character. It has been my design, therefore, to furnish to the legal profession a treatise which should deal with the equity jurisdiction and jurisprudence as they now are throughout the United States; with their statutory modifications and limitations, and under their different types and forms in various groups of states; and thus to prepare a work which would be useful to the bench and bar in all parts of our country. During its composition I have constantly had before me a high ideal. The difficulty in carrying out this conception has been very great; the labor which it has required has been enormous. That I may have fallen short of this ideal in all its completeness and perfection, I am only too conscious; its full realization was perhaps impossible. If the book shall be of any help to the courts and the profession in administering equitable doctrines and rules; if it shall be of any assistance to students in disclosing the grand principles of equity; if it shall to any extent maintain the equitable jurisprudence in its true position as a constituent part of the municipal law,— then the time and labor spent in its composition will be amply repaid.

The internal plan, the system of classification and arrangement, the modes of treatment, and especially the reasons for departing from the order and methods which have usually been followed by text-writers, are described at large in the third, fourth, and fifth sections of the Introductory Chapter. To that chapter I would respectfully refer any reader who may at the outset desire a full explanation of these matters, which are so important to a full understanding of an author's purposes, and to a correct appreciation of his work. The book is submitted to the profession with the hope that it may be of some aid to them in their judicial and forensic duties, and may accomplish something for the promotion of justice, righteousness, and equity in the legal and business transactions and relations of society.

J. N. P.

HASTINGS COLLEGE OF THE LAW.
SAN FRANCISCO, May, 1881.

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PART FIRST.

THE NATURE AND EXTENT OF EQUITY JURISDICTION.

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A TREATISE

ON

EQUITY JURISPRUDENCE.

TREATISE

ON

EQUITY JURISPRUDENCE.

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§ 1. **Object of This Introduction.**— It is not my purpose to attempt a complete and detailed history of equity as it exists in England and in the United States. That work has already been done by Mr. Spence, in his Equitable Jurisdiction of the Court of Chancery. Some general account, however, of the origin of the equitable jurisdiction, of the sources from which the principles and doctrines of the equity jurisprudence took their rise, and of the causes which led to the establishment of the Court of Chancery, with its modes of procedure separate and distinct from the common-law tribunals, with their prescribed and rigid forms of action, is absolutely essential to an accurate conception of the true nature and functions of equity as it exists at the present day. I shall therefore preface this introductory chapter with a short historical sketch, exhibiting the system in its beginnings, and describing the early movements of that progress through which its principles have been developed into a vast body of doctrines and rules which constitute a most important department of the municipal law.

§ 2. **Æquitas in the Roman Law.**— The growth and functions of equity as a part of the English law were anticipated by a similar development of the same notions in the Roman jurisprudence. In fact, the equity administered by the early English chancellors, and the jurisdiction of their court, were confessedly borrowed from the *æquitas* and judicial powers of the Roman magistrates; and the one cannot be fully understood without some knowledge of the other. This intimate connection between the two systems is a sufficient reason or excuse for the following brief statement of the mode in which *æquitas* was introduced into the Roman law, and of the important part which it performed, under the great jurists and magistrates of the empire, in shaping the doctrines of that wonderful jurisprudence. The researches of modern juridical scholars have exposed the falsity of much that has been written by English authors, such as Blackstone and Coke, with respect to the origin of their law, and have demonstrated the existence of the closest relations between the Roman jurisprudence and the early English common law. These relations with the growing common law were disturbed, and finally broken, from political motives and considerations; but with the equity jurisprudence they became, for that very reason, even more intimate, and have so continued until the present day.[1]

§ 3. In the earliest period of the Roman law of which there is any certain trace remaining, and thenceforward for a considerable time after the epoch of the legislation known as the Twelve Tables, there were five actions (*legis actiones*) for the enforcement of all civil rights. Nothing could exceed the arbitrariness and formalism of these judicial proceedings. Absolute accuracy was required in complying with the established phrases and acts; any omission or mistake of a word or a movement was fatal. Gaius, who wrote long after they were abolished, says of them: "But all these actions of the law fell gradually into great discredit, because the over-subtlety of the ancient jurists made the slightest error fatal."[1] These actions finally became obsolete and disappeared, except one of them, which under a modified form was retained for certain very special cases until a late period of the empire. The analogy between them and the old "real actions" of the English common law is striking and complete. Their place, in all ordinary controversies, was supplied by a species of judicial proceedings much more simple and natural, to which the generic name "formula" was given.[2]

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§ 2, [1] See Bracton and his relations with the Roman Law, by C. Güterbock; translated by Brinton Coxe.

§ 3, [1] Institutes, b. iv., § 30.

§ 3, [2] As to "formulas," see Gaius's Institutes, b. iv., §§ 30–52; Poste's ed. of Gaius, pp. 423–441; Sandar's Institutes of Justinian, pp. 63–67. It should be remembered that the formula was drawn up by or under the direction of the magistrate. I add, as an illustration, one of the most simple kinds of formulas, as given by Gaius, with a brief explanation of its various parts. It is a simple action to recover the price of a thing sold. "*Judex esto, Quod Aulus Agerius Numerio Negidio hominem vendidit, si paret Numerium Negidium Aulo Agerio sestertium X millia dare oportere, judex Numerium Negidium Aulo Agerio sestertium X millia condemnato, si non paret, absolvito.*

The *judex esto*, "let there be a judex," is merely the order for the appointment of a judex. The formula consists of three distinct parts. From *quod*

§ 4. These formulas were the regular steps or processes in a cause prior to the trial, reduced to writing, but always carefully regulated by fixed rules, and conducted in accordance with prescribed forms. The parties appeared before the magistrate, and the formula was prepared by him, or under his direction. It contained, as the most important elements, what we would call the "pleadings," namely, a statement of the plaintiff's cause of action, bearing different names in different actions, which was expressed in certain technical language, varying with the nature of the action, of the claim, and of the

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to *vendidit* is the *demonstratio*, from *si paret* to *dare oportere* is the *intentio;* and from *judex* to the end is the *condemnatio*. The formula ordinarily contained only these three parts.

The *demonstratio* is the general statement of facts which are the ground of plaintiff's claim to recover. As in this case Aulus Agerius, the plaintiff says "that Aulus Agerius sold a slave to Numerius Negidius." The *demonstratio* varied, of course, in each particular case. The *intentio* is the most important part. It is the precise statement of the legal demand made by the plaintiff; it presents and embodies the exact question of law involved in the case, and depending upon the facts as they shall be established one way or the other. It must, therefore, exactly meet the law which would govern the facts alleged by the plaintiff, if true. Whether in this case the plaintiff sold the slave to the defendant at the price alleged, and whether the debt is still owing, is the matter to be decided by the judex. If it appear to the judex (*si paret*) that Numerius Negidius ought to pay to Aulus Agerius ten thousand sesterces, then the judex is to pronounce judgment against him; if it does not so appear to the judge, then he is to acquit. The *condemnatio* is the direction to the judex to condemn or to acquit, according to the true circumstances of the case.

The *condemnatio* was always pecuniary, a direction to condemn the defendant to pay a sum of money. The various modifications in the actions by the prætors largely consisted in their adding other kinds of specific reliefs, which might be awarded. Thus in three actions, to partition a family inheritance, to divide the property of partners, and to settle boundaries, the judex was directed "to adjudicate" the thing, in the sense of distributing it among the litigants entitled to portions. In these actions there was a fourth part of the formula containing such direction, and called the *adjudicatio*. Where the action was brought to recover a thing, and not a sum of money, the *condemnatio* sometimes left the sum to be paid by defendant to be fixed by the judex, at his discretion; and sometimes inserted the words *nisi restituat*, so that the defendant was only ordered to pay the sum of money, if he refused or neglected to restore or deliver up the thing to the plaintiff. See Pomeroy's Introduction to Municipal Law, §§ 183, 184.

relief asked; the defendant's answer, also varying according to the action and the defense; it also contained the appointment of the lay person who was to try the issue and render judgment, the judex or the arbiter; the rule of law which was to govern him, not stated, however, as an abstract proposition, but simply as a direction, in short and technical terms, to render such a judgment if the plaintiff proved the case stated in the pleading, otherwise to dismiss the suit. The whole formula was contained in a few brief sentences, and the technical words or phrases used indicated clearly the nature of the action, the relief to be given, the defenses to be admitted, and the legal rule to be followed. The contrast between its brevity, simplicity, and at the same time comprehensiveness, and the repetitions, redundancy, verbiage, and obscurity of the later common-law special pleadings, is very striking and instructive. The formula being thus prepared before the magistrate (the cause being at that stage *in jure*), the parties then went before the "judex," or "arbiter," and proceeded with the trial (the cause being then *in judicio*). He heard the testimony and the arguments of counsel, and rendered the judgment; but the cause was thereupon taken before the magistrate a second time, who enforced the judgment and also possessed a revisory authority over the decision of the judex. It is plain that the functions of the "judex" corresponded closely with those of our jury; and even his power in rendering the judgment was not essentially different from that of the jury in giving their verdict, since the judgment itself, which ought to be rendered, was prescribed in the direction of the formula, and the judex had no more authority than the jury has in determining the rule of law which should govern the rights of the parties.[1] The functions of the magistrates were more complex.

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[1] Of course it is not claimed by me that the "judex," or "arbiter," was identical with our jury, nor that he was the historical source of the jury. All that I assert is, that there are striking analogies between the two; and of

§ 5. The most important magistrates, after the development of the Roman law had fairly commenced, and down to the period under the empire at which the administration was entirely remodeled, were the prætors Urban and Peregrine (*Prætor Urbanus, Prætor Peregrinus*). The prætor, in the totality of his juridical functions, corresponded both to the English common-law courts and the Chancellor. As the English courts, by means of their legislative function, have built up the greater part of the law of England, so did the prætors, by the exercise of the same function, construct the largest part of the Roman jurisprudence, which was afterwards put into a scientific shape by the great jurists of the empire, and was finally codified in the Pandects of Justinian. This legislative work of theirs was done in a manner and form so outwardly different from that of the English judges, that many writers, and especially the German commentators, who seem utterly unable to comprehend in its fullness the legislative attributes, both of the English and the Roman judicial magistrates, have failed to perceive the identity. The identity, however, exists, and the differences are wholly formal. The legislative work of the English and American courts has been and still is done in the judgments and opinions rendered upon the decision of cases after the events have happened which called for such official utterances. The same work of the Roman prætors was done in the edicts (*edicta*) which they issued upon taking office, and which in process of time became one continuous body of law, each magistrate taking what had been left by his predecessors, and altering, amending, or adding to the same, as the needs of an advancing civilization required. The form of this edict was peculiar.

this no unprejudiced student of jurisprudence can, for a moment, doubt. I make this remark because the teachings of some German professors indicate an entire incapacity on their part to understand the development of the Roman jurisprudence under the light thrown upon it by the historical progress of the English law. See Pomeroy's Introduction to Municipal Law, §§ 315, 316, 317.

Instead of laying down abstract propositions defining primary rights and duties, or publishing formal commands similar to modern statutes, the magistrates announced that under certain specified circumstances a remedy would be granted by means of a designated action, where the prior law gave no such remedy; or that under certain circumstances, if a person attempted to enforce a rule of the prior law by action, a defense which had not existed before would be admitted and sustained.

§ 6. The jurisdiction of the prætors, which was exercised by means of formulas, and in which a judex or other lay person was called in to decide the issues of fact, was called his "ordinary" jurisdiction. In the later periods of the republic, there arose another jurisdiction termed the "extraordinary" (*extra ordinem*). In causes coming under this jurisdiction, the magistrate himself decided both the law and the facts, without the intervention of any judex, and unhampered by any technical requirements as to the proper formula or kind of action. The plaintiff alleged the facts making out his cause of action, the defendant set forth his defense, and the magistrate decided. By this method remedies could be given which were not provided for in any of the existing forms of action, and equitable notions could be more freely applied, and thus incorporated into the growing mass of the national jurisprudence. In this extraordinary jurisdiction we can plainly see the prototype of English chancery procedure; while the ordinary methods by formulas were as certainly the analogues of the common-law forms of action. The extraordinary jurisdiction continued for a long time side by side with the ordinary, growing in extent and importance until it became the only mode in common use. By a constitution of the Emperor Diocletian (A. D. 294), all causes in the provinces were required to be tried in this manner; and finally the same rule was made universal throughout the empire. Here, again, we may see another of the repetitions which history exhibits under the operation of like social forces. This event in the Roman jurisprudence was in all its essential elements similar to the recent legislation of Great Britain and of the American states, by which all distinction between suits in equity and actions at law has been abolished, and the two jurisdictions have been combined in the same proceeding and conferred upon the same tribunal.

§ 7. As has been already stated, the legislative work of the prætors was accomplished by the introduction of new actions, whereby a right could be enforced, which the law prior to that time did not recognize, or which it perhaps absolutely denied. The number of particular actions thus invented or allowed by the prætorian law was large, and they have been separated by the commentators into many classes, according to various lines of division. It will be sufficient for my purposes of description to arrange them in three groups. The early law of Rome which existed prior to the time when the prætorian development fairly commenced, and the external form or *shell* of which was preserved through a large part of that development,— the *jus civile*,— was exceedingly stern, rigid, formal, and arbitrary, paying little attention to abstract right and justice, reflecting in every part the character and customs of the primitive Romans. It admitted certain prescribed actions and defenses appropriate for certain facts and circumstances, but for other facts and circumstances differing from those to which the existing actions or defenses were exactly adapted, it furnished no remedy. In their work of building up a broader jurisprudence upon the narrow basis of this ancient *jus civile*, the prætors, in the *first* place, introduced a class of actions which were substantially the same as those provided by the existing law, unaltered in any of their essential features, but enlarged in the scope of their operation. In other words, the magistrates employed the old-established actions of the *jus civile*, without changing the technical words, phrases, and parts of their *formulæ*, but extended their application to new cases, facts, and circumstances. These new facts and circumstances did not differ widely from the subject-matter to which the actions had been originally adapted by the former law; they necessarily came within the same general principle which had furnished the rule of decision before the scope of the actions was thus enlarged. In a similar manner, the English law courts have, in later times, used the ancient actions of debt, covenant, and trespass, without altering their technical forms, for the decision of issues which had not arisen in the earlier periods of the common law. The *second* of the three groups or classes contained a large number of new actions first allowed by the prætors, which, though not substantially the same, were analogous or similar in their nature and objects to those which existed in the ancient *jus civile.* The formulas of these new actions bore a general resemblance to those of the old, and were indeed patterned after them, but still differed from them in various important particulars. Necessary changes were made in the statement of the plaintiff's cause of action, of the defendant's defense, or of the direction for the judgment addressed to the judex or the arbiter. New cases were thus provided for; new rules of law were introduced, old ones were modified or repealed. The number of particular actions embraced in this class was large, and in the course of the legal development from age to age, the prætors were enabled by their means to soften the rigor of the old law, to remove its arbitrariness, and to mold its doctrines into a nearer conformity with the principles of right and justice. The actions comprised in this class, and the service which they rendered in improving the Roman law, were strictly analogous to the actions of ejectment, case, trover, and especially assumpsit, and the work which they have performed in expanding and ameliorating the common law. The *third* class consists of the new actions introduced from time to time, which were wholly different, both in principle and form, from any that had existed under the old law. In their invention the magistrate dissevered all connection with the ancient methods, and by their use, more than by any other means, he constructed a jurisprudence founded upon and interpenetrated by equitable doctrines which finally supplanted the old *jus civile,* and became the Roman law as it was scientifically arranged by the great jurists of the empire, and is known to us as the Pandects and Institutes of Justinian.[1]

§ 8. In their work of improving the primitive *jus civile,* the magistrates who issued edicts (who possessed the *jus edicendi*), and the jurisconsults who furnished authoritative opinions (*responsa*) to aid the prætors (those who possessed the *jus respondendi*),[1] obtained their material from two sources, namely: At first, from what they termed the *jus gentium,* the law of nations, meaning thereby those rules of law which they found existing alike in the legal systems of all the peoples with which Rome came into contact, and which they conceived to have a certain universal sanction arising from principles common to human nature; and at a later day, from the Stoic theory of morality, which they called *lex naturæ,* the law of nature. The doctrines of this *jus gentium* and of this *lex naturæ* were often identical, and hence arose the conception, generally prevalent among the juridical writers of the empire, that the "natural law" (*lex naturæ*) and the "law of nations" (*jus gentium*) were one and the same; or in other words, that the doctrines which were found common to all national systems were dictated by and a part of this natural law. The particular rules of the Roman jurisprudence derived from this morality, called the law of nature, were termed "*æquitas*," from *æquum*, because they were supposed to be impartial in their operation, applying to all persons alike. The *lex naturæ* was assumed to be the governing force of the world, and was regarded by the magistrates and jurists as having an absolute authority. They felt themselves, therefore, under an imperative obligation to bring the jurisprudence into harmony with this all-pervading morality, and to allow such actions and make such decisions that no moral rule should be violated. Whenever an adherence to the old *jus civile* would do a moral wrong, and produce a result inequitable (*inæquum*), the prætor, conforming his edict or his decision to the law of nature, provided a remedy by means of an appropriate action or defense. Gradually the cases, as well as the modes in which he would thus interfere, grew more and more common and certain, and thus a body of moral principles was introduced into the Roman law, which constituted equity (*æquitas*).[2] This resulting equity was not a separate department; it penetrated the entire jurisprudence, displacing what of the ancient system was arbitrary and unjust, and bringing the whole into an accordance with the prevailing notions of morality. In its original sense, *æquitas, æquum,* conveyed the conception of universality, and therefore of impartiality, a having regard for the interests of *all* whose interests ought to be regarded, as contrasted with the having an exclusive or partial regard for the interests of *some,* which was the essential character of the old *jus civile*. At a later period, and especially after the influence of Christianity had been felt, the signification of *æquitas* became enlarged, and was made to embrace our modern conceptions of right, duty, justice, and morality.

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§ 7, [1] Pomeroy's Introduction to Municipal Law, §§ 185–192; Sandars's Institutes of Justinian, pp. 67–71; Poste's Institutes of Gaius, pp. 368, 400–406; Phillimore's Private Law among the Romans, pp. 150–159.

§ 8, [1] I have not, in the foregoing paragraphs, discussed the peculiar functions of the jurisconsults, and the effect of their "responses," because it was my object, not to describe the Roman law at large, but simply to point out the analogies between its modes of development, and those of our own law. I will, however, state the conclusion reached by the ablest modern scholarship: That although the responses of the jurisconsults always had a high authority, and although during a long period of time the magistrates were bound under certain limitations to adopt their official opinions as precedents, yet the magistrate alone possessed the *creative* function of *legislating,* of making *law.* He went to the opinions of the official jurisconsults for his material, for the *sources* of his legislation; but those opinions did not obtain the compulsive efficacy of *law,* until they had been adopted by the judicial magistrate, and reissued by him through the means of his edict or his decisions. The theory long maintained, that the jurisconsults possessed the power of *legislating,* and that they created the Roman jurisprudence, has been abandoned. See Pomeroy's Introduction to Municipal Law, §§ 315–317.

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[2] See Sandars's Institutes of Justinian, pp. 13, 14; Phillimore's Private Law among the Romans, pp. 21, 22; 2 Austin on Jurisprudence, pp. 240–267.

§ 9. There are certainly many striking analogies between the growth of equity in the Roman and in the English law; the same causes operated to make it necessary, the same methods were up to a certain point pursued, and in principle the same results were reached. The differences, however, are no less remarkable. No separate tribunal or department was made necessary in the Roman jurisprudence, because the ordinary magistrates were willing to do what the early English common-law judges utterly refused to perform; that is, to promote and control the entire legal development as the needs of an advancing civilization demanded. While these common-law judges resisted every innovation upon their established forms, and shut up every way for the legal growth, the Roman magistrates were the leaders in the work of reform, and constantly anticipated the wants of the community. The English judges made a new court and a separate department indispensable; the Roman prætors accomplished every reform by means of their own jurisdiction, and preserved in the jurisprudence a unity and homogeneity which the English and American law lacks, and which it can perhaps never acquire. Both these resemblances and these contrasts are exhibited in the following paragraphs, which describe the introduction of equity into the English system of jurisprudence.

+ § 10. **Origin of Equity in the English Law — Primitive Condition of the Law and the Courts.**— During the Anglo-Saxon and early Norman periods, the law of England was, like that of all peoples in the first stages of their development, to a large extent consuetudinary. The primitive Saxon Codes, except so far as they re-enacted certain precepts taken from the Holy Scriptures, or borrowed a few provisions from the then known remains of the Roman law, were chiefly redactions of prior existing customs. The Saxon local folk courts, and even the supreme tribunal of the Witana-gemote, not being composed of professional judges, were certainly guided in their decisions of particular controversies by customs which, when established and certain, were considered as having the same obligatory character which we give to positive law.[1]

§ 11. In the reign of William the Conqueror the local folk courts of the Saxon polity were left in existence; and they, together with the manor courts of the Norman barons, continued to be the tribunals of first resort (to use a modern term) for the trial of ordinary disputes, through several succeeding reigns; but they gradually lost their functions and sunk into disuse as the more strictly professional tribunals grew in importance and extended their jurisdiction, until they were finally superseded by the itinerant justices appointed by the crown or by the King's Court as representative of the crown. William, however, made some most important innovations. In the *Curia Regis,* King's Court, which then, and for a considerable time afterwards, was a body composed of barons and high ecclesiastics with legislative, judicial, and administrative functions as yet unseparated, he appointed a Chief Justiciary to preside over the hearing of suits. This creation of a permanent judicial officer was the germ of the professional common-law tribunals having a supreme jurisdiction throughout England, which subsequently became established as a part of the government, distinct from the legislative and the executive. He also appointed, from time to time, as occasion required, itinerant justices to travel about and hold "pleas" or preside over the Shire Courts in the different counties. These officers were temporary, and ceased when their special duties had been performed, but they were the beginning of a judicial system which still prevails in England, and which has been adopted in many of the American states.

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[1] As to the account in following paragraphs, see 1 Spence's Eq. Jur., pp. 87–128.

§ 12. The organization thus made or permitted by William continued without any substantial change, but yet with gradual modifications and progressive improvements, through several of the succeeding reigns. The business of the King's Court steadily and rapidly increased; under Henry II. its judicial functions were finally separated from the legislative, and from that time until its abolition in 1874, it has continued to be the highest common-law tribunal of original jurisdiction, under the name of the Court of King's Bench. In the reign of Henry I. itinerant justices were sometimes appointed, as by William the Conqueror, and under Henry II. their office and functions were made permanent; but during the reign of Edward III. their places were filled and their duties performed by the justices of the Superior Courts, acting under special commissions empowering them to hold courts of oyer and terminer and of *nisi prius*. These itinerant justices — "justices in eyre"— went from county to county, holding pleas civil and criminal, and as a consequence the old local courts of the shire, hundred, and manor were abandoned as means of determining controversies between litigant parties. The King's Court, even after it became a purely judicial body, was attached to the person of the King, and followed him in his journeys and residences in different parts of the realm. The great inconvenience to suitors resulting from this transitory quality of the court was remedied by Magna Charta, which provided in one of its articles that "Common Pleas shall no longer follow the King." In obedience to this mandate of the Charter, justices were appointed to hear controversies concerning lands, and other matters purely civil,— known as "common" pleas,— and the new tribunal composed of these judges was fixed at Westminster. Thus commenced the Court of Common Bench. The third superior common-law tribunal acquired its powers in a much more irregular manner. In arranging his government, William the Conqueror had established a board of high officials to superintend and manage the royal revenues, and a number of barons, with the chief justiciary, were required to attend the sittings of this board, in order to decide the legal questions which might arise. These judicial assessors, in the course of time, became the Court of Exchequer, a tribunal whose authority originally extended only to the decision of causes directly connected with the revenue, but its jurisdiction was subsequently enlarged, through the use of legal fictions, and thus made, to a certain extent, concurrent with that of the two other Superior Law Courts. The office of Chancellor was very ancient. It had existed before the conquest, and was continued by William. Under his successors, the Chancellor soon became the most important functionary of the King's government, the personal adviser and representative of the crown, but, in the very earliest times, without, as it seems, any purely judicial powers and duties annexed to the position. How these functions were acquired, it is the main purpose of this historical sketch to describe. The three superior law courts whose origin has thus been stated have remained, with some statutory modification, through the succeeding centuries, until, by the Judicature Act of 1873, which went into operation November 2, 1875, they and the Court of Chancery, and certain other courts, were abolished as distinct tribunals, and were consolidated into one "Supreme Court of Judicature."[1]

§ 13. The local folk courts left in existence at the conquest, and even the itinerant justices and the central King's Court, for a while continued to administer a law which was largely customary. The progress of society, the increase in importance of property rights, the artificial system which we call feudalism, with its mass of arbitrary rules and usages, all demanded and rapidly produced a more complete, certain, and authoritative jurisprudence for the whole realm than the existing popular customs, however ancient and widely observed. This work of building up a positive jurisprudence upon the foundation of the Saxon customs and feudal usages, this initial activity in creating the common law of England, was done, not by parliamentary legislation nor by royal decrees, but by the justices in their decisions of civil and criminal causes. The law which had been chiefly customary and therefore unwritten, preserved by tradition, *lex non scripta,* was changed in its form by being embodied in a series of judicial precedents preserved in the records of the courts, or published in the books of reports, and thus it became, so far as these precedents expressed its principles and rules, a written law, *lex scripta.*[1]

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[1] 36 & 37 Vict., chap. 66, § 3: "From and after the time appointed for the commencement of this act, the several courts hereinafter mentioned (that is to say), the High Court of Chancery of England, the Court of Queen's Bench, the Court of Common Pleas at Westminster, the Court of Exchequer, the High Court of Admiralty, the Court of Probate, the Court for Divorce and Matrimonial Causes, and the London Court of Bankruptcy, shall be united and consolidated together, and shall constitute, under and subject to the provisions of this Act, one Supreme Court of Judicature in England."

§ 14. **Early Influences of the Roman Law.**— In this work of constructing a jurisprudence, the early common-law judges, as well as the Chancellor at a later day, drew largely from their own knowledge of the Roman law. The evidence, both internal and historical, is conclusive that the common law of England, in the earliest formative period, was much indebted to that Roman jurisprudence which enters so largely into the judicial systems of all the western nations of the European continent. Besides the proof furnished by the law itself, several important facts connected with the external history of its primitive stages point to this conclusion. The clergy, who possessed all the learning of the times, were students of the Roman law. The earliest justices of the common-law courts, as well as the chancellors, were generally taken from the higher orders of ecclesiastics; and on all occasions where it was necessary for them to legislate in the decision of particular cases, to create new rules for relations hitherto undetermined, they naturally had recourse to the code with which they were familiar, borrowed many of its doctrines, and adopted them as the ground of their judgments. Nor was a knowledge of the Roman law confined to the courts; its study became a part of what would now be called the higher education. When the spirit of free inquiry was suddenly awakened at the commencement of the twelfth century, one of its most remarkable manifestations was shown in the scientific study of the Roman law which began at the University of Bologna in 1120, and soon extended over western Europe. In 1143, Archbishop Theobald, who had himself studied at Bologna, brought a distinguished civilian, Vacarius, into England, and this jurist in 1149 established a school of the Roman law at the University of Oxford, which soon rose to an eminence second only to those of Paris and of Bologna. King Stephen afterwards prohibited Vacarius from public teaching, but this act, instead of stopping the study in England, produced the contrary effect of stimulating and promoting it. Bracton's celebrated work, De Legibus et Consuetudinibus Angliæ, written between A. D. 1256 and 1259,[1] and which is an epitome or systematic institute of the common law as it then existed, exhibits in the plainest manner the results of the judicial labor and scientific study which had preceded it. A considerable portion of its doctrines, and even of the terms in which its rules are stated, is taken directly from standard treatises of the day upon the Roman jurisprudence. In the language of a recent writer: "As Roman legal matters obtained reception, although the written sources of the Roman law were not at all received as having a legislative authority, Bracton properly included such Roman legal matter among the *leges et consuetudines Angliæ.*"[2]

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[1] The division of "written" and "unwritten" law made by Blackstone, and writers who have copied his notions, which makes the "written" identical with the statutory, and describes the entire portion embodied in judicial decisions as "unwritten," is simply absurd. This definition is another instance of Blackstone's mistaking the meaning of Roman law terms. The *lex non scripta* is customary, traditional, preserved in the popular memory; a law expressed in judicial *records* or in statutes is written. The Roman prætorian edicts formed a part of the *lex scripta* as much as the *leges* or the imperial "constitutions."

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[1] Bracton and his relations with the Roman law, by Carl Güterbock; translated by Brinton Coxe, p. 24.

§ 15. Had it not been for several powerful causes, partly growing out of the English national character, or rather, the character of the Norman kings and barons who ruled over England, and partly arising from external events connected with the government itself, it is probable that this work of assimilation and of building up the common law with materials taken from the never-failing quarries of the Roman legislation, would have continued throughout its entire formative period. As the *corpus juris civilis* contains the results of the labors of the great philosophic jurists who brought the jurisprudence of Rome to its highest point of excellence, and as its rules, so far as they are concerned with private rights and relations, are based upon principles of justice and equity, it is also certain that if this work of assimilation had thus gone on, the common law of England would from an early day have been molded into the likeness of its original. Through the decisions of its own courts the principles of justice and equity would everywhere have been adopted, and would have appeared throughout the entire structure. All this would have been accomplished in the ordinary course of development, by the ordinary common-law tribunals, without any necessity for the creation of a separate court which should be charged with the special function of administering these principles of right, justice, and equity. The growth of the English law would have been identical in its external form with that of Rome; it would have proceeded in an orderly, unbroken manner through the instrumentality of the single species of courts, and the present double nature of the national jurisprudence — the two great departments of "Law" and "Equity"— would have been obviated. This result, however, was prevented by several potent causes which checked the progress of the law towards equity, narrowed its development into an arbitrary and rigid form, with little regard for abstract right, and made it necessary that a new jurisdiction should be erected to administer a separate system more in accordance with natural justice and the rules of a Christian morality. These causes I proceed to state.

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[2] Ibid., p. 62.

§ 16. **Causes Which Made a Court of Equity Necessary.**— The one which was perhaps the source and explanation of all the others consisted in the rigid character, external and internal, which the common law soon assumed after it began to be embodied in judicial precedents, and the unreasoning respect shown by the judges for these decisions *merely as precedents.* There was, of course, a time, before the character of the law as a *lex scripta* became well established, when this rigidity and inflexibility was not exhibited.[1] The history of civilized jurisprudence can show nothing of the same kind comparable with the blind conservatism with which the common-law judges were accustomed to regard the rules and doctrines which had once been formulated by a precedent, and the stubborn resistance which they interposed to any departure from or change in either the spirit or the form of the law which had been thus established. The most that was ever allowed was the extension of a doctrine to facts and circumstances presenting some points of difference from those which had already formed the subject-matter of adjudication, but in which this difference was not so great as to require a substantial modification of the principle. The frequent occurrence of cases in which the rules of the law produced manifest injustice, and of cases to which the legal principles as settled by the precedents could not apply, and the unwillingness of the common-law judges to allow any modification of the doctrines once established by their prior decisions, furnished both the occasion and the necessity for another tribunal, which should adopt different methods and exhibit different tendencies.[2]

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[1] Thus Bracton, who wrote during this formative period, before the law had entirely assumed its rigid character, adopting the maxim which he found in the Roman law, *In omnibus, maxime tamen in jure, æquitas spectanda est,* asserts that the common-law courts should be guided by equity even in questions of strict law: Lib. 2, chap. 7, fol. 23 b; Lib. 4, fol. 186. But this doctrine was soon abandoned.

§ 17. When the same difficulty of rigidness, arbitrariness, and non-adaptation to the needs of society began to be severely felt in the administration of the law at Rome, the magistrates, as I have before shown, supplied the remedy by means which they already possessed. The prætors constantly invented new actions and defenses, which preserved, however, a resemblance to the old; and at length they boldly freed the jurisprudence from the restraints of the ancient methods, and introduced the notion of *æquitas* by which the whole body of judicial legislation became in time reconstructed. All the process of development was completed without any violent or sudden change in the judicial institutions, and the Roman law thus preserved its unity and continuity. The English common-law judges, on the other hand, set themselves with an iron determination against any modification of the doctrines and rules once established by precedent, any relaxation of the settled methods which made the rights of suitors to depend upon the strictest observance of the most arbitrary and technical forms, any introduction of new principles which should bring the law as a whole into a complete harmony with justice and equity. I would not be understood as asserting that the conservatism of the courts was so absolute as to prevent any improvement or progress in the law from age to age. I only describe the general attitude and tendency during the period in which the court of chancery took its rise and for a long time thereafter. The improvement which an advancing civilization effected in the nation itself was to a partial extent reflected in the law. It is certain, however, beyond the possibility of dispute, that the English common law was always far behind the progress of the English people, and in very many particulars retained the impress of its primitive barbarism down to the present century. By the continental jurists contemporary with Coke, Lord Hale, or Blackstone, it was regarded with mingled feelings of wonder and contempt as a barbarous code; and except in its provisions securing the personal and political rights of the individual, and in its antagonism to the slavish doctrine of the Roman jurisprudence, *Quod placuit principi legis vigorem habet,* it was a barbarous code. Parliamentary legislation occasionally interfered and effected a special reform; and the principles of equity as administered by the Court of Chancery reacted to a slight degree upon the law; but still the common-law judges as a body exhibited the blind conservatism which I have described down to a period wholly modern. With the partial exception of Lord Holt, whose masculine intellect sometimes broke away from the trammels,[1] Lord Mansfield was the first great English judge who consciously, and with systematic and persistent purpose, adopted the policy of the Roman prætors, endeavored to impart a new life and give a new direction to the growth of the common law, and by means of equitable principles in combination with its own methods to reform the law from within. As a reward for these innovations, Lord Mansfield was charged in his own day — and the accusation has been handed down as a part of judicial history — with ignorance of the English law. Although the work which Lord Mansfield began was interrupted by his narrow-minded successor, Lord Kenyon, it has been taken up and carried on in the same spirit by many of the able judges who have adorned the English bench within the present century, and by the state and national courts of this country, until the common law has now become a truly scientific and philosophical code.

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[2] This position of resistance, so soon assumed by the common-law judges, is well described by Mr. Spence in the following passage: "It has always been held by the great oracles of the law that the principles of the common law are founded on reason and equity; and as long as the common law was in the course of formation, and therefore continued to be a *lex non scripta*, it was capable, as indeed it has ever continued to be to some extent, of not only being extended to cases not expressly provided for, but which were within the spirit of the existing law, but also of having the principles of equity applied to it by the judges in their decisions, as circumstances arose which called for the application of such principles. But in the course of time a series of precedents was established by the decisions, or *responsa*, as Bracton calls them, of the judges, which were considered of almost equally binding authority on succeeding judges as were the acts of the legislature; and it became difficult to make new precedents without interfering with those which had already been established. Hence (though new precedents have ever continued to be made) the common law soon became to a great extent a *lex scripta* positive and inflexible; so that the rule of justice could not accommodate itself to every case according to the exigency of right and justice": 1 Spence's Eq. Jur., pp. 321, 322. The description of the text is not intended to apply to the entire history of the common law. Another spirit has animated its judges since the example set by Lord Mansfield, and its inherent power of development, when freed from the narrow and obstructive notions of the earlier judges, has been fully exhibited both in England and in the United States.

§ 18. A second cause which prevented a development of the national jurisprudence in harmony with and by the aid of the equitable notions contained in the Roman codes, and which therefore tended to the creation of a separate court of chancery, was the fact that the rules concerning real property and, to a considerable extent, those concerning personal *status* and relations, were feudal in their origin and nature. From whatever source the ultimate notion of feudal tenure was derived, whether from the Roman emphyteusis or from German tribal customs, it is certain that there was nothing in common between the institutions of feudalism as they existed under the Norman kings, and the doctrines of the Roman law. As long, therefore, as these institutions continued to flourish there was of necessity a large and most important part of the English law which could receive no accession or improvement from doctrines of the Roman jurisprudence; no combination of the two was possible. Roman principles were subsequently introduced by the Court of Chancery in its enforcement of uses as a special kind of property in lands; but there was even then no combination. Feudal dogmas were maintained by the courts of law, and Roman notions by the court of equity; and the two systems ran on, confronting and even hostile to each other, until the Parliament interposed in the reign of Henry VIII., and by the celebrated Statute of Uses effected a partial union.

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[1] Lord Holt was never thoroughly emancipated from a fanatical devotion to the ancient law, and sometimes resisted innovations which even his inferior associates on the bench could see were demanded by the necessities of society and of business. A remarkable instance may be seen in his refusal to adopt the customs of merchants in regard to promissory notes, a refusal which compelled Parliament to interfere by statute and place these contracts upon the same basis as inland bills of exchange. On the other hand, his celebrated opinion in Coggs v. Bernard was an unprecedented departure from the ordinary modes of the court, and opened the way for subsequent judges to follow into the rich mines of the Roman jurisprudence. And his no less celebrated judgment in Ashby v. White exhibited, more clearly than has perhaps been done by any other judge, the unlimited power of development inherent in the common law where its essential principles are freely carried out and its bondage to form and established precedent is broken. Among the recent English judges who have represented the ancient rather than the modern tendencies of the law, and who have exalted its rules of form, Baron Parke stands the foremost, and has actually obtained the reputation of a jurist, because he was able to discuss and state these arbitrary dogmas in a scientific manner, and to clothe them with some appearance of a philosophic system. But in no series of English reports are the rights of suitors made to depend upon a compliance with mere forms, and the decisions made to turn upon mere technicalities, more than in the volumes of Meeson and Welsby.

§ 19. Although the feudal institutions in their integrity were undoubtedly an obstacle to the introduction of Roman law principles, and the development of one homogeneous jurisprudence for the English people, still the obstacle was not insuperable. The same institutions existed on the continent, and in Germany, especially, they have largely modified the law down to the time when the present system of codes was adopted. Notwithstanding this fact, the Roman law has entered as the principal element into the jurisprudence of every western continental nation, and through it the doctrines of equity have been everywhere accepted, not as constituting a separate department, but as pervading and influencing the whole.

§ 20. The third cause which I shall mention, and it was an exceedingly important one in its effects upon the jurisdiction of chancery, which had already become quite extensive, arose from the position and policy of the kings, the Parliament, and the nation towards the church of Rome. The English kings had maintained a long and bitter struggle with the Pope and his emissaries among the higher ecclesiastics to maintain the independence of the crown and of the Anglican branch of the church. In the reign of Edward III., the exactions of the Papal See became peculiarly hateful to the King and to the nation. Having the support of his Parliament, Edward refused payment of the tribute which had been demanded by the Pope, and measures were taken to prevent any further encroachments. A general hostility, or at least a sentiment of opposition, to the Papal court and to everything connected with it had sprung up and spread among all ranks of the laity. The Roman law fell under this common aversion. Partly from its name, partly because it was supported by the Papal See, both on account of its connection with the canon law, and on account of its doctrines favorable to absolutism, and partly because a knowledge of it prevailed most extensively among the ecclesiastics, so that it was popularly regarded as an instrument of the church, the Roman law, which had been treated with favor by Henry II., Henry III., and Edward I., and by the judges themselves in former reigns, became an object of general dislike, and even antipathy. In the reign of Henry III. the barons formally declared that they would not suffer the kingdom to be governed by the Roman law;[1] and the common-law judges prohibited it from being any longer cited in their courts. This action of the barons and judges was certainly a mistake, and it produced an opposite effect from the one intended. The Roman law, instead of being banished, was simply transferred to another court, which was not governed by common-law doctrines. As the law courts intentionally cut themselves off from all opportunity of borrowing equitable principles from this foreign source, the necessity arose for a separate tribunal, in which those principles could be recognized. It therefore followed, immediately upon this prohibition, that the hitherto narrow jurisdiction of the Court of Chancery was greatly increased, and extended over subject-matters which required an ample and constant use of Roman law doctrines. To the same cause was chiefly due the selection, which was really a necessity, of chancellors from among the ecclesiastics, during the period while the jurisdiction of the court was thus enlarged and established.[2]

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[1] "Quod noluerunt leges Angliæ mutare, quæ usque ad illud tempus usitatæ fuerunt et approbatæ." The occasion upon which this memorable declaration was made, at the Parliament of Merton, A. D. 1236, was the attempt of the ecclesiastics to introduce the doctrine that illegitimate children are made legitimate by the subsequent marriage of their parents. This doctrine was peculiarly distasteful to the English barons, since it interfered with the feudal rules of inheritance. For a full account of the controversy in all its stages, see Bracton and his relations with the Roman Law, p. 129.

Blackstone states the time and place to have been the Parliament of Tewksbury, A. D. 1234.

[2] In confirmation of the text, I quote the following passages from Mr. Spence. Speaking of the prohibition by the common-law judges mentioned in the text, he says: "Perhaps one object of the judges might have been to exclude the doctrine as to *fidei-commissa*, or trusts, which first came distinctly into notice during this reign (Richard II.). The effect, however, of the exclusion of the Roman law from the common-law tribunals was that a distinct code of laws was formed and administered in the Court of Chancery, by which the enjoyment and alienation of property were regulated on principles varying in many essential particulars from the system which those who originated and carried into effect the exclusion of the Roman law were so anxious to preserve. Nor were these united endeavors for the exclusion of the Roman law less important in fixing the appointment of the office of Chancellor in the members of the clerical body. Notwithstanding all the efforts that were made to repress them, trusts soon became general. Some rules for their regulation were absolutely necessary. It was from the Roman law they had sprung up; who so proper to introduce and systematize the rules necessary for their regulation as those who were now exclusively conversant with this law, and who alone, as it was excluded from the common-law courts, could resort to it for their guidance? Accordingly, from this time, with some exceptions, none but clerical chancellors were appointed, down to the twenty-first year of Henry VIII. It may be well doubted whether but for the last circumstance the system of equitable jurisprudence

§ 21. **The Earliest Common-law Actions and Procedure.**— The last cause which I shall mention, and practically the most immediate and efficient one in its operation to prevent any expansion of the common law, so as to obviate the necessity of a separate equitable jurisdiction, was the peculiar procedure which was established by the courts at a very early day, and to which they clung with a surprising tenacity. This procedure furnished a fixed number of "forms of action." Every remedial right must be enforced through one of these forms; and if the facts of a

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which we find established in the reign of Henry VIII., on which the doctrine of uses and much of the modern jurisdiction of the court is founded, would then have existed. The antipathy to the Roman law which in the reign of Elizabeth was extended, as regards a considerable portion of the community, to everything Roman, and the intensity of which has scarcely yet subsided, broke forth in the latter end of the reign of Elizabeth, and in that of James I., in a way that leaves little doubt as to what would have become of the equitable principles of the Court of Chancery, if that court in its infancy had been permanently committed to common-law judges as chancellors. I cannot but here notice, as some confirmation of the conjecture which is hazarded above, that a writer of the reign of James I., who, if not, as he styles himself, a sergeant, was evidently speaking the sentiments of that order, says: 'The common law commandeth all that is good to be done'; 'The suit by subpœna is against the common weal of the realm.' The whole of the system which formerly prevailed in the Court of Chancery as to uses, and which was then applied to trusts, is also denounced by him in terms which show that under chancellors taken from the professors of the common law merely, the modern system of equitable jurisprudence would never have been reared, at least in the Court of Chancery. One of his complaints is, that relief was given where the amount secured by a bond or recognizance had been paid, and no release obtained." (It was one of the absurd doctrines of the old common law, that a sealed instrument could only be discharged by another instrument of as high a character. If the debtor on a bond paid the full amount, and failed to obtain an acquittance under seal, or a surrender up of the instrument, even though he took a written receipt in full, he was still liable, and could have no defense to an action on the bond! One of the first measures of equity was to overthrow this iniquitous rule by enjoining the action at law brought under such circumstances against the debtor, and it is of this interference that the writer in question bitterly complains. He says:) "When a bill has been made to the Chancellor that such a man should have great wrong to be compelled to pay two times for one thing, the Chancellor, not knowing the *goodness* of the common law (!), has timorously directed a subpœna to the plaintiff (in the action at law); and the Chancellor, regarding no law, but trusting to his own wit and wisdom, giveth judgment as it pleaseth him": 1 Spence's Eq. Jur., p. 347.

particular case were such that neither of them was appropriate, the injured party was without any ordinary legal remedy, and his only mode of redress was by an application made directly to the King. The initial step in every action was a written document issued in the name of the King, called a writ, which was both the commencement and the foundation of all subsequent proceedings. This document gave a brief summary of the facts upon which the right of action was based, and contained certain technical formulas indicating what form of action was brought and what remedy was demanded. If it had been possible for suitors or the officers of the court to multiply these writs indefinitely, so as to meet all possible circumstances and social relations, there would have been no difficulty, and the procedure could have been expanded so as to embrace every variety of wrong and every species of remedial right which might subsequently arise in the course of the national development. But there was absolutely no such possibility, and herein was the essential vice of the system. The nature of these writs was fixed, and could not be substantially changed. A writ had been settled, not only for each of the different "forms of action," but for the facts, circumstances, and events which could constitute the subject-matter of the particular actions embraced within each one of these several "forms of action." The precedents of all the writs which had been thus established were kept in an office connected with the chancery, called the *Registra Brevium.* Certain officers of the chancery were charged with the duty of issuing the writs to plaintiffs, and this they did by selecting and copying the one which agreed with the facts of the applicant's case. If no writ could be found in the collection which substantially corresponded with the facts constituting the ground of complaint, then the plaintiff could have no action. The chancery clerks could not draw up entirely new writs, nor alter the existing ones in any substantial manner; it is probable, however, that they assumed to make some slight changes, so as to accommodate the recitals to the facts of special cases, but this power could only be exercised within the narrowest limits. There were, however, certain kinds of facts connected with every cause of action, which might be varied. The statements in the writs were somewhat general in their terms, some applying to land, some to chattels, others to persons, debts, torts; and, of course, the particulars of quantity, size, value, time, place, amount of damage, and the like, were not material, and could be varied without limit. One other fact of the utmost importance remains to be mentioned. Although the chancery clerks decided in the first place upon the form and kind of writ in every case, and thus determined the species of action to be brought, this decision did not in the least protect or secure the plaintiff after he had commenced his action. When the action came before the common-law courts, the judges assumed and constantly exercised the power of determining the sufficiency of the writ; and if they held that it was not the proper one for the case, or that its recitals of facts or formulas were imperfect or mistaken, no attention was given to the prior decision of the chancery officials, the writ and action were dismissed, and the plaintiff thrown out of court.

§ 22. The ancient actions of the common law, prior to the statutory legislation hereafter mentioned, as described by Bracton, were of two general classes: 1. Those which concerned lands and all estates or interests therein; and 2. Those which concerned persons, chattels, contracts, and torts. The former class, the *Real Actions,* included a considerable number of particular actions, adapted to various estates and rights, some for determining the title, others for the recovery of possession merely; and were all technical and arbitrary in their modes of procedure. The action of ejectment by which they were superseded was a growth of later times. The second class, the *Personal Actions,* contained two actions *ex contractu,* " Debt " and " Covenant," and two *ex delicto,* " Trespass " and " Detinue." " Replevin," which was one of the most ancient judicial proceedings known to the English law, was so restricted in its use to special circumstances and inferior courts that it was not classified among the ordinary common-law forms of action. The functions of these four personal actions are so well known that no description of them is necessary.

§ 23. From this enumeration it is plain that the common law furnished a very meager system of remedies, utterly insufficient for the needs of a civilization advancing beyond the domination of feudal ideas. The appliances for maintaining rights over land were perhaps sufficient in number and in variety, but they were excessively cumbrous, and the rights of suitors were liable to be defeated by some failure in technical matters of form. The lack of remedial instruments was chiefly felt in the class of personal actions. No contract could be enforced unless it created a certain debt, or unless it was embodied in a sealed writing. No means was given for the legal redress of a wrong to person or property, unless the tortious act was accompanied with violence, express or implied. The injuries and breaches of contract which now form the subject-matter of so much litigation were absolutely without any legal remedy. It is true, the ancient records show a few instances in which the action of trespass was extended to torts without violence, such as defamation, but these cases were exceptional and governed by no legal rule. The chief defect, however, of the legal procedure, which rendered it incomplete as a means of administering justice, and wholly insufficient for the needs of a people whose social relations were constantly growing more complex, consisted in its inability to adapt its actual reliefs to the varying rights and duties of litigants. Whatever might be the form of action used, the remedy conferred by its judgment was either a recovery of the possession of land, a recovery of the possession of chattels, or a recovery of money. Although these simple species of relief might be suited to a primitive society, the necessity of other and more specific forms, adapted to various circumstances and relations, was felt as soon as the progress of the nation towards a higher civilization had fairly begun. From the causes which I have thus briefly described, the common-law courts were closed against a large and steadily increasing class of rights and remedies, and a distinct tribunal, with a broader and more equitable jurisdiction and mode of procedure, became an absolute necessity, or else justice would be denied.

§ 24. **Statute of Edward I. Concerning New Writs.**— Parliament at length interposed with a reformatory measure which was intended to be radical, and which perhaps might have checked the growing jurisdiction of chancery if the common-law judges had treated the statute in the same liberal spirit with which it was enacted. As all writs for the commencement of actions were drawn up by the clerks in chancery, the legislature attempted to remove all the existing difficulties by enlarging the powers of these officials, and conferring upon them a wide discretion in the invention of new forms of writs, suitable to new conditions of fact, and providing for remedial rights hitherto without any means of enforcement. In the reign of Edward I. the following statute was passed:[1] "Whensoever from henceforth it shall fortune in chancery that in one case a writ is found, and in a like case falling under *like law* and requiring *like remedy* is found none, the clerks of the chancery shall agree in making the writ, or the plaintiff may adjourn it into the next Parliament, and let the cases be written in which they cannot agree, and let them refer themselves to the next Parliament, and by consent of men learned in the law a writ shall be made, lest it should happen after *that the court should long time fail to minister justice unto complainants.*"

§ 25. **Limited Results of This Legislation.**— The general intent of this enactment is perfectly clear, and it should have been liberally and largely construed in accordance with that intent. The common-law judges, however, applied to it a strict and narrow construction, a literal and verbal interpretation, wholly foreign to its design and meaning. Although by its means the new common-law forms of action known as "Case," "Trover," and "Assumpsit" were invented, which in later times have been the most potent instruments for the development and improvement of the common law itself,[1] yet so far as the legislature proposed to enlarge the scope of the law by the introduction of equitable principles and remedies, and thereby to stop the growth of the equitable jurisdiction of chancery, that purpose was wholly frustrated by the action of the law judges in construing and enforcing the statute. The main points in which this restrictive interpretation was made effective, so as to defeat the ultimate object of the statute, were the following:—

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[1] 13 Edw. I., chap. 1, § 24.

§ 26. 1. The act permitted the framing of new writs in cases "falling under *like law* and requiring *like remedy*" with the existing ones. Upon this permissive language the courts put a highly restrictive meaning. As the common-law forms of action gave only three different kinds of remedies, every remedy obtained through the means of the new writs must be *like* one of these three species. Thus at one blow all power was denied of awarding to suitors any special equitable relief which did not fall within one or the other of these three classes, and parties who required such special forms of remedy were still compelled to seek them from another tribunal. The same was true, irrespective of the particular kinds of relief, of all cases which might arise, quite dissimilar in their facts and circumstances from those to which the existing forms of action applied; not falling under "like law," they were held to be without the scope of the statute, and the complainants could obtain no redress from the common-law courts.

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[1] I have elsewhere described the manner in which these new actions were invented,— one of the most interesting events in the history of the English law. See Pomeroy's Introduction to Municipal Law, §§ 200–204.

§ 27. 2. The statute only provided for new writs on behalf of plaintiffs. As civilization progressed, and the relations of men grew more intricate from increase of commerce, trade, and other social activities, new defenses as well as new causes of action constantly arose. Although these were not within the letter of the act, they were fairly within its spirit. But the law courts adhered to the letter, and ignored the spirit. If, therefore, the new matter of defense did not fall within the prescribed formulas of the legal actions, and did not conform to the established rules defining legal defenses, the party must seek relief in some manner from the jurisdiction of the chancellor.[1]

§ 28. 3. Although the statute authorized the "clerks of chancery" to frame the new writs, and seemed by implication to confer upon them the absolute powers with respect to the matter which, it was conceded, were held by Parliament, still the common-law judges assumed for themselves the same exclusive jurisdiction to pass upon the propriety and validity of the new writs which they had always exercised over those issued by the clerks prior to the statute. They did not regard the action of the chancery officials in sanctioning a writ which would give a new remedial right to the plaintiff as at all binding, and in fact rejected all the new writs contrived in pursuance of the statute, which did not closely conform to some one of the existing precedents. The chancery clerks, being ecclesiastics and acquainted with the Roman law, seem to have fashioned most of their new writs in imitation of the Roman *formulæ;* but all these innovations upon the established methods the law courts refused to accept.

§ 29. This legislation, however, produced in the course of time the most beneficial effects upon the development of the common law itself, independently of the chancery jurisdiction. Upon the basis of certain new writs contrived by the chancery clerks and adopted by the law judges, three additional legal actions were invented, "Trespass on the Case," and its branches or offshoots, "Trover," and "Assumpsit," which have been the most efficient and useful of all the forms of legal actions in promoting the growth of an enlightened national jurisprudence. Without the action of "Case" applicable to an unlimited variety of wrongs, and affording an opportunity for enforcing the maxim, *Ubi jus ibi remedium,* and the action of "Assumpsit," by which the multiform contracts growing out of trade and commerce could be judicially enforced, it is safe to say that the common law of England would have remained stationary in the condition which it had reached at a time not later than the reign of Edward III. These two actions resembled the *actiones bonæ fidei* of the Roman law, in admitting motives of natural right and justice for the decision of causes, instead of purely technical and arbitrary rules of form. When at a still later day the principles of equity began to react upon the law, and the common-law judges freely applied these equitable doctrines in adjudicating upon legal rights, it was chiefly through these actions of Case and Assumpsit that the work of reforming and reconstructing the common law was accomplished. The actions of Trespass, Covenant, and Debt have remained, even to the present day, technical in their modes and arbitrary in their rules; but the actions of Case, Trover, and Assumpsit have been free from formal restraints, flexible in their adaptability, capable of being administered in conformity with equitable doctrines. Through their means, many of the rules which were originally established by the Chancellor have been incorporated into the law, and are now mere legal commonplaces.[1]

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[1] This jurisdiction, to be effective, would generally be exercised by means of enjoining the legal action brought against the party applying to the chancellor, and in which his attempted defense had been rejected.

§ 30. **Commencement and Progress of the Chancery Jurisdiction.**—I have thus far described the causes existing in the early condition of the common law, and in the attitude of the law courts, which rendered necessary a separate tribunal with an equitable jurisdiction, and a procedure capable of being adapted to a variety of circumstances, and of awarding a variety of special remedies. I now proceed to state the origin of this tribunal, and the principal events connected with the establishment of its jurisdiction.

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[1] For an account of the origin and progress of these actions, see 1 Spence's Eq. Jur., pp. 237-254; Pomeroy's Introduction to Municipal Law, §§ 200-204.

§ 31. **Original Powers of the King's Council.**—Under the early Norman kings, the Crown was aided by a Council of Barons and high ecclesiastics, which consisted of two branches,— the General Council, which was occasionally called together, and was the historical predecessor of the Parliament, and a Special Council, very much smaller in number, which was in constant attendance upon the King, and was the original of the present Privy Council. It was composed of certain high officials, as the Chancellor, the Treasurer, the Chief Justiciary, and other members named by the King. This Special Council aided the Crown in the exercise of its prerogative, which, as has been stated, embraced a judicial function over matters that did not or could not come within the jurisdiction of the ordinary courts. The extent of this judicial prerogative of the King was, from its nature and from the unsettled condition of the country, very ill defined. It appears from an ancient writer that in the time of Henry I. the Select Council generally took cognizance of those causes which the ordinary judges were incapable of determining. From later records it appears that the council acted on all applications to obtain redress for injuries and acts of oppression, wherever, from the heinousness of the offense, or the rank and power of the offender, or any other cause, it was probable that a fair trial in the ordinary courts would be impeded, and also wherever, by force and violence, the regular administration of justice was hindered. The council also seems to have had a jurisdiction in cases of fraud, deceit, and dishonesty, which were beyond the reach of common-law methods. It is evident, however, that this extraordinary jurisdiction of the King and council was not always exercised without opposition, especially when the matters in controversy fell within the authority of the common-law courts.

§ 32. **Original Common-law Jurisdiction of the Chancellor.**— Side by ~~side~~ with this extraordinary or prerogative judicial function exercised by the King, or by the Select Council *in his name and stead,* there grew up a jurisdiction of the Chancellor. This is not the place to detail the numerous special powers of that officer, for we are only concerned with those which were judicial. It is certain that the Chancellor possessed and exercised an important *ordinary* — that is, common-law — jurisdiction, similar to that held by the common-law courts, and wholly independent of the extraordinary prerogative jurisdiction originally possessed by the King and council, and afterwards delegated to the Chancellor himself. The proceedings in causes arising before the Chancellor, under this, his ordinary jurisdiction, were commenced by common-law process, and not by bill or petition; he could not summon a jury, but issues of fact in these proceedings were sent for trial before the King's Bench. When this ordinary common-law jurisdiction of the Chancellor commenced is not known with certainty; it had risen in the reign of Edward III. to be extensive and important, and it had probably existed through several reigns.[1]

§ 33. **Jurisdiction of Grace Transferred to the Chancellor.**— In addition to this ordinary function as a common-law judge, the Chancellor began at an early day to exercise the extraordinary jurisdiction — that of *Grace* — by delegation either from the King or from the Select Council. The commencement of this practice cannot be fixed with any precision. It is probable that the judicial power of the Chancellor as a law judge, and his consequent familiarity with the laws of the realm, and experience in adjudicating, were the reasons why, when any case came before the King which appealed to his judicial prerogative, and which for any cause could not be properly examined by the council, such case was naturally referred either by the Crown or by the council to the Chancellor for his sole decision. Whatever may have been the motives, it is certain that the Chancellor's extraordinary equitable jurisdiction commenced in this manner. At first it was a tentative proceeding, governed by no rule, the reference being sometimes to the Chancellor alone, sometimes to him in connection with another official, and even occasionally to another official without the Chancellor. In the reign of Edward I., such references of cases coming before the King and council to the Chancellor, either alone or in connection with others, were very common, although the practice of selecting him alone had not yet become fixed.

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[1] Many of the cases appearing by the earliest records to have been decided by the Chancellor, and which have been regarded by some writers as showing that his equitable powers were then ill defined, and included matters of purely legal cognizance, should undoubtedly be referred to this his common-law, and not to his equitable, jurisdiction. He was, in fact, during this early period, and before the equitable jurisdiction became established, a *common-law judge.*

§ 34. The practice of delegating the cases which came before the prerogative judicial function of the Crown and its council to the Chancellor, for his sole decision, having once commenced, it rapidly grew, until it became the common mode of dealing with such controversies. The fact that the attention of the King and of his high officials was constantly engaged in matters of state administration rendered this method natural and even necessary. In the reign of Edward III., the Court of Chancery was in full operation as the ordinary tribunal for the decision of causes which required an exercise of the prerogative jurisdiction, and the granting of special remedies which the common-law courts could not or would not give. Edward III. established this jurisdiction, which hitherto had been merely permissive, upon a legal and permanent foundation. In the twenty-second year of his reign, by a general writ, he ordered that all such matters as were of *Grace* should be referred to and dispatched by the Chancellor, or by the Keeper of the Privy Seal. The Court of Chancery, as a regular tribunal for the administering of equitable relief and extraordinary remedies, is usually spoken of as dating from this decree of King Edward III.; but it is certain that the royal action was merely confirmatory of a process which had gone on through many preceding years.

§ 35. The delegation made by this order of the King conferred a general authority to give relief in all matters, of what nature soever, requiring the exercise of the prerogative of *Grace.* This authority differed wholly from that upon which the jurisdiction of the law courts was based. These latter tribunals acquired jurisdiction in each case which came before them by virtue of a delegation from the Crown, contained in the particular writ on which the case was founded, and a writ for that purpose could only be issued in cases provided for by the positive rules of the common law. This was one of the fundamental distinctions between the jurisdiction of the English common-law courts, under their ancient organization, and that of the English Court of Chancery.[1] The principles upon which the Chancellor was to base his decision in controversies coming within the extraordinary jurisdiction thus conferred upon him were Honesty, Equity, and Conscience.[2] The usual mode of instituting suits in chancery became, from this time, that by bill or petition, without any writ issued on behalf of the plaintiff.

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[1] This distinction has never existed in the United States. The highest courts of law and of equity, both state and national, derive their jurisdiction either from the constitutions or from the statutes. There is no such thing as a delegation of authority from the executive or the legislature to these courts; for the authority of the courts and of the other branches of the government is directly derived from the same source,— the organic body politic composing the state or the nation.

[2] The following case illustrates the kind of matters brought before the King and referred to the Chancellor: Lady Audley, without joining her husband, sued her father-in-law to obtain a specific performance of certain covenants in her favor in the deed of settlement made on her marriage. Nothing could be more opposed to common-law doctrines. This was in 35 Edward III., and it shows that two most important heads of equity jurisprudence were then known,— the protection of the wife's separate interests, and specific performance of contracts. See Sir F. Palgrave's History of the Council, pp. 64, 67.

§ 36. **Development of the Equitable Jurisdiction.**— Having thus shown the historical origin of the chancery as a court distinct from the common-law tribunals, I shall now describe the growth of the equitable jurisdiction until it became settled upon the certain basis of principles which has continued without substantial change to the present time. In the earliest periods the jurisdiction was ill defined, and was in some respects even much more extensive than it afterwards became when the relations between the equity and the common-law tribunals were finally adjusted. This was chiefly due to the troublous times, the disturbed condition of the country, while violence and oppression everywhere prevailed, and the ordinary courts could give but little protection to the poor and the weak; when the powerful landowners were constantly invading the rights of their inferiors and overawing the local magistrates. In the reign of Richard II. the Chancellor actually exercised some criminal jurisdiction to repress violence, and restrain the lawlessness of the great against the poor and helpless. He also entertained suits concerning land, for the recovery of possession or the establishment of title, and even actions of trespass, when there had been dispossession with great violence.[1] A strong opposition naturally arose to these alleged usurpations by the Chancellors; but they persevered as long as was necessary, and were supported by the King and council.

§ 37. There were other reasons, inhering in the nature of its procedure and extent of its remedial functions, which operated to extend the authority and increase the business of the chancery court. It possessed and exercised the power, which belonged to no common-law court, of ascertaining the facts in contested cases by an examination of the parties under oath,— the "probing their consciences," — a method which gave it an enormous advantage in the discovery of truth, and which has only within our own times been extended to all other tribunals. Again, the Chancellor was able to grant the remedy of prevention, which was wholly beyond the capacity of the law courts; and he seems to have used this kind of relief with great freedom, unrestrained by the rules which have since been settled with respect to the injunction. As the business of the court increased and became regular and constant, the practice was established in the reign of Richard II. of addressing the suitor's bills or petitions directly to the Chancellor, and not to the King or his council. During the same reign a statute was passed by Parliament for the purpose of regulating the business of the court and restraining its action, which enacted that when persons were compelled to appear before the council or the chancery on suggestions found to be untrue, the Chancellor should have power to award damages against the complainant, in his discretion.[1] This statute was a solemn recognition by Parliament of the court as a distinct and permanent tribunal, having a separate jurisdiction and its own modes of procedure and of granting relief; and the enactment was an important event in the legal history of the chancery.

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[1] The instances of the kind mentioned in the text are probably all referable to the notion, which seems to have been entertained by the early chancellors, that one important head of their jurisdiction, founded upon the principle of *conscience*, was the protection of the poor, weak, helpless, and oppressed against the rich and powerful. This early notion has left some traces in the subsequent equity jurisprudence.

§ 38. In the reign of Richard II., Uses first came distinctly into notice and were brought under judicial cognizance. This species of interest in land was utterly unknown to the common law, and foreign to the feudal notions; it was therefore ignored by the law courts, and fell under the exclusive control of chancery. As uses were derived, with much modification, from the Roman law, the doctrines of that jurisprudence were naturally resorted to in deciding controversies respecting them, and in settling the rules for their government. The action of the law judges in banishing the Roman law from their courts, which has already been described,[1] also operated very powerfully to throw the consideration of these matters into the chancery, and greatly augmented and strengthened its authority. No one subject has contributed so much to enlarge and perfect the jurisdiction of the Court of Chancery as the uses thus surrendered to its exclusive cognizance. The principles which underlie them and the trusts which succeeded them have been extended to all departments of equity, and have been more efficient than any other cause in building up an harmonious system of equitable jurisprudence in conformity with right and justice. These flexible principles have been applied to almost every relation of life affecting property rights, and have been molded so as to meet the exigencies of the infinite variety of circumstances which arise from modern civilization. They have even reacted upon the common law, and have been recognized by the law judges in their settlement of the rules which govern the rights and obligations growing out of contract.

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[1] 17 Rich. II., chap. 6.

V § 39. In the reigns of Henry IV. and Henry V., the Commons, from time to time, complained that the Court of Chancery was usurping powers and invading the domain of the common-law judges. It is a very remarkable fact, however, that this opposition never went to the extent of denouncing the equity jurisdiction as wholly unnecessary; it was always conceded that the law courts could furnish no adequate remedy for certain classes of wrongs, and that a separate tribunal was therefore necessary. As the result of these complaints, statutes were passed which forbade the Chancellor from interfering in a few specified instances of legal cognizance, but did not abridge his general jurisdiction. In the reign of Edward IV. the Court of Chancery was in full operation; the mode of procedure by bill filed by the complainant, and a subpœna issued thereon to the defendant, was settled; and the principles of its equitable jurisdiction were ascertained and established upon the basis and with the limitations which have continued to the present time. No more opposition was made to the court by the Commons, although the law judges from time to time, until as late as the reign of James I., still denied the power of the Chancellor to interfere with matters pending before their own courts, and especially disputed his authority to restrain the proceedings in an action at law, by means of his injunction. This controversy between the law and the equity courts, with respect to the line which separates their jurisdictions, has in fact never been completely settled; and perhaps it must necessarily continue until the two jurisdictions are blended into one, or at least are administered by the same judges in the same proceeding.[1]

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[1] See *ante*, § 20.

§ 40. **Abolition of the Court in England and in Many American States.**— The court of equity, having existed as a separate tribunal for so many centuries, has at length disappeared in Great Britain and in most of the American states, and the reforming tendency of the present age is strongly towards an obliteration of the lines which have hitherto divided the two jurisdictions. By the recent legislation of England and of many of the states in this country, the separate tribunals of law and of equity have been abolished; the two jurisdictions have been so far combined that both are administered by the same court and judge; legal and equitable rights are enforced and legal and equitable remedies are granted in one and the same action; and the distinctions which hitherto existed between the two modes of procedure are as far as possible abrogated, one kind of action being established for all judicial controversies.[1]

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[1] Wherever the distinctions between suits in equity and actions at law have been abolished, and equitable and legal rights may be enforced, and equitable and legal remedies may be obtained, in the same proceeding, we might suppose this contest would necessarily have disappeared, and it necessarily would have disappeared if the courts had carried out the plain intent of the legislation; unfortunately, however, in some of the states where this legislation has been adopted, the distinction between the legal and equitable jurisdictions is kept up as sharply as though there were the separate tribunals, and the different systems of procedure.

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[1] The English Judicature Act of 1873, already quoted, after uniting all the higher tribunals into one Supreme Court of Judicature, enacts that "in every civil cause or matter, law and equity shall be concurrently administered" by this court according to certain general rules; and that generally in all matters not particularly mentioned in other provisions of the act, in which there is any conflict or variance between the rules of equity and the rules of the common law, with reference to the same matter, the rules of equity shall prevail: 36 & 37 Vict., chap. 66, §§ 24, 25. This great reform, which was inaugurated by New York in 1848, has been adopted by the states of Ohio, Kentucky, Indiana, Wisconsin, Iowa, Minnesota, Missouri, Kansas, Nebraska, Nevada, California, Oregon, North Carolina, South Carolina, Arkansas, Connecticut, Colorado, and by the territories of Washington, Montana, Idaho, Dakota, Wyoming, Arizona, Utah. The form of legislation which has generally been adopted is substantially the following: "The distinction between actions of law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and there shall be in this state hereafter but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action." In two or three of the states a slight external distinction between legal and equitable actions is still preserved. Their codes of procedure contain the following provision: "All forms of action are abolished; but the proceedings in a civil action may be of two kinds, 'ordinary' or 'equitable.' The plaintiff may prosecute his action by equitable proceedings in all cases where courts of equity had jurisdiction, and must so proceed in all cases where such jurisdiction was exclusive. In all other cases the plaintiff must prosecute his action by ordinary proceedings. An error of the plaintiff as to the kind of proceedings adopted shall not cause the abatement or dismissal of the action, but merely a change into the proper proceedings, and a transfer of the action to the proper docket. The provisions of this code concerning the prosecution of a civil action apply to both kinds of proceedings, whether ordinary or equitable." As one court has jurisdiction over both kinds of proceedings, it is plain that the distinction here preserved is wholly superficial; it really goes no further than the designation to be put at the commencement of the plaintiff's pleading, and the placing the cause on the proper docket or trial list of the court. In 1879 Connecticut adopted a Practice Act, which contains the *fundamental* and *essential* features of the reformed system of procedure, although it rather resembles the English Judicature Act than the Codes of Procedure in the various states, since it only enacts these fundamental and essential principles, and leaves the details of practice to be regulated by rules established by the courts. It provides, in section 1, that there "shall be but one form of civil action"; and in section 6: "All courts which are vested with jurisdiction, both at law and in equity, may hereafter, to the full extent of their respective jurisdictions, administer legal and equitable rights, and apply legal and equitable remedies, in favor of either party, in one and the same suit, so that legal and equitable rights of the parties may be enforced and pro-

§ 41. **Equity Jurisdiction in Other American States.**— In the national courts of the United States, and in most of the states which have not adopted the reformed procedure, the two departments of law and equity are still maintained distinct in their rules, in their procedure, and in their remedies; but the jurisdiction to administer both systems is possessed and exercised by the same tribunal, which in one case acts as a court of law, and in the other as a court of equity. The organization of the judiciary differs widely in the states of this class, and no attempt need be made to describe it. The procedure at law is based, although in most instances with extensive modifications, upon the old common-law method, and retains in whole or in part the ancient forms of action. The equity procedure is the same in its essential principles with that which long prevailed in the English Court of Chancery, but is much simplified in its details and rules.[1]

§ 42. In a very few of the states the policy of separation is still maintained. Law and equity are not only distinct departments, but they are administered by different tribunals, substantially according to the system, both in respect to jurisdiction and procedure, which existed in England prior to the recent legislation. There is a court of general original jurisdiction at law, and another court of equity, consisting

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tected in one action; *provided*, that wherever there is any variance between the rules of equity and the rules of the common law, in reference to the same matter, the rules of equity shall prevail." It will be noticed that this last clause is the same in effect as one contained in the English Judicature Act, and this alone gives the Connecticut system a superiority over that prevailing in the other American states. It is remarkable that the codes of all the other states have not been amended by the introduction of this most admirable provision. Equitable and legal defenses and counterclaims are also permitted.

[1] This mode of judicial organization and of maintaining the two jurisdictions with one tribunal has been adopted by the United States for the national judiciary, and by the following States: Connecticut, Florida, Georgia, Illinois, Maine, Maryland, Massachusetts, Michigan, New Hampshire, Pennsylvania, Rhode Island, Texas, Vermont, Virginia, West Virginia. Connecticut no longer belongs to this class. By a statute of 1879 the reformed procedure was, in its essential features, adopted: See *ante*, note to § 40.

of one or more chancellors, and the two are entirely distinct in the persons of the judges, and in the judicial functions which they possess. Even in these states, however, there is generally but one appellate tribunal of last resort, which reviews on error the judgments of the law courts, and on appeal the decrees of the Chancellor.[1]

SECTION II.

THE NATURE OF EQUITY.

ANALYSIS.

§ 43. Importance of a correct notion of equity.
§§ 44, 45. Various meanings given to the word.
§§ 46, 47. True meaning as a department of our jurisprudence.
§§ 48–54. Theories of the early chancellors concerning equity as both supplying and correcting the common law.
§§ 55–58. Sources from which the early chancellors took their doctrines; their notions of "conscience" as a ground of their authority.
§§ 59–61. Equity finally established upon a basis of settled principles.
§ 62. How the equitable jurisdiction is determined at the present day.
§§ 63–67. Recapitulation: Nature of equity stated in four propositions.

§ 43. **Importance of a Correct Notion of Equity.**— I purpose in this section to ascertain the nature of equity as it now exists in one of the great departments into which the law of the United States and of England is divided, and to fix its exact relations with the other department, which, by a most confusing use of terms, is called the "Law" or the "Common Law." This inquiry is not purely theoretical; it is, on the contrary, in the highest degree practical. An accurate conception of equity is indispensable to the due administration of justice. If a certain theory of its nature, which now prevails to some extent, should become universal, it would soon destroy all sense of certainty and security which the citizen has, and should have, in respect to the existence and maintenance of his juridical rights. Since the combination of legal and equitable remedies in one judicial proceeding which has been effected in many of the states, the notion seems to have been revived, somewhat vague and undefined perhaps, but still widely diffused among the legal profession, that equity is nothing more or less than the power possessed by judges — and even the duty resting upon them — to decide every case according to a high standard of morality and abstract right; that is, the power and duty of the judge to do justice to the individual parties in each case. This conception of equity was known to the Roman jurists, and was described by the phrase, *Arbitrium boni viri*, which may be freely translated as the decision upon the facts and circumstances of a case which would be made by a man of intelligence and of high moral principle; and it was undoubtedly the theory in respect to their own functions, commonly adopted and acted upon by the ecclesiastical chancellors during the earliest periods of the English Court of Chancery. It needs no argument to show that if this notion should become universally accepted as the true definition of equity, every decision would be a virtual arbitration, and all certainty in legal rules and security of legal rights would be lost.

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[1] This system exists in Alabama, Delaware, Mississippi, New Jersey, Tennessee.

§ 44. **Various Meanings Given to the Word.**— Before proceeding to examine the nature of English and American equity, as above stated, I shall briefly mention some of the meanings which have been given to the word, taken in its general sense, and not as designating a particular department of the municipal law. The original or root idea of the word. as first used by the Roman jurists, *universality*, and thence *impartiality*, has already been explained. From this fundamental notion, equity has come to be employed with various special significations. It has been applied in the interpretation of statutes, when a legislative enactment is said to be interpreted equitably; or, as the expression often is, according to the equity of the statute. This takes place when the provisions of a statute, being perfectly clear, do not in terms embrace a case which, in the opinion of the judge, would have been embraced if the legislator had carried out his general design. The judge, supplying the defective work of the legislator, interprets the statute *extensively,* or according to its equity, and treats it as though it actually did include the particular case. The word was sometimes used in this sense by the Roman jurists, when applied to modes of interpretation, and also by the earlier English text-writers and judges; but is not often employed with such a meaning by writers of the present day.

§ 45. Another signification sometimes given to equity is that of judicial impartiality; the administration of the law according to its true spirit and import, uninfluenced by any extrinsic motives or circumstances; the application of the law to particular cases, in conformity with the special intention or the general design of the legislator.[1] A third meaning makes equity synonymous with natural law as that term is used by modern writers, or morality; so that it practically becomes the moral standard to which all law should conform. It is in this sense that the epithet "equitable" is constantly used, even at the present day, by judges and text-writers, in order to describe certain doctrines and rules which, it is supposed, will tend to promote justice and right in the relations of mankind, or between the litigant parties in a particular case.[2] The only other signification which I shall mention does not greatly differ from the one last given. In that use of the term, equity is the unchangeable system of moral principles to which the law does or should conform; but in this use it rather describes the power belonging to the judge — a power which must, of course, be exercised according to his own standard of right — to decide the cases before him in accordance with those principles of morality, and so as to promote justice between suitors, even though in thus deciding some rule of positive law should be violated or at least disregarded. This conception of equity regards it, not as a system of juridical principles and rules based upon morality, right, and justice, but rather as a special function or authority of the courts to dispense with fixed legal rules, to limit their generality, or to supplement their defects in particular cases, not in obedience to any higher and more comprehensive doctrines of the same positive national jurisprudence, but in obedience to the dictates of natural right, or morality, or conscience.[3]

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[1] In accordance with this conception, the following definitions have been given: "The application of the statute law to a given case, agreeably to the specific intention or the general design of the legislator." "*Æquitas nihil est quam benigna et humana juris scripti interpretatio, non ex verbis, sed a mente legislatoris facta.*" (Equity is nothing but the liberal and humane interpretation of the written law, made, not according to its words, but in conformity with the intent of the legislator.) "*Benignius leges interpretandæ sunt, quo voluntas earum conservaretur.*" (Positive laws ought to be interpreted liberally, so that their design will be preserved.)

[2] It is with this meaning of the word that French jurists have said: "*L'equité est l'esprit de nos lois*"; and a Roman jurist said: "*Æquitas est honestas.*"

§ 46. **True Meaning as a Department of our Jurisprudence.**— I am now prepared to examine, and if possible determine, the true nature of equity considered as an established branch of our American as well as of the English jurisprudence. We are met at the very outset by numerous definitions and descriptions taken from old writers and judges of great ability and high authority, many of which are entirely incorrect and misleading, so far at least as they apply to the system which now exists, and has existed for several generations. These definitions attribute to equity an unbounded discretion, and a power over the law unrestrained by any rule but the conscience of the Chancellor, wholly incompatible with any certainty or security of private right. For the purpose of illustrating these loose and inaccurate conceptions, I have placed in the foot-note a number of extracts taken from the earlier writers.[1]

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[3] This theory was known to the Roman juridical writers; it was the notion constantly maintained by Cicero, who says: "*Æquitas est laximentum juris,*" and traces of it are found throughout the Digest. It was universally adopted by the clerical chancellors in the earliest stages of the chancery jurisdiction; and the English equity commenced, and for a considerable period continued, its growth as a direct result of this conception: See 2 Austin on Jurisprudence, pp. 272–280.

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[1] In the Doctor and Student (Dial. 1, chap. 16), equity is thus described: "In some cases it is necessary to leave the words of the law, and to follow what reason and justice requireth, and to that intent equity is ordained; that is to say, *to temper and mitigate the rigor of the law.* . . . And so it appeareth that equity taketh not away the very right, but only that that seemeth not to be right by the general words of the law. . . . Equity is righteousness that considereth all the particular circumstances of the deed, which is also tempered with the sweetness of mercy." In Grounds and Rudiments (pp. 5, 6) it is said: "As *summum jus summa est injuria* since it cannot consider circumstances, and as equity takes in all the circumstances of the case, and judges of the whole matter according to good conscience, this shows both the use and excellency of equity above any prescribed law. . . . Equity is that which is commonly called equal, just, and good, and is *a mitigation and moderation of the common law* in some circumstances, either of the matter, person, or time; and often it dispenseth with the law itself. . . . The matters of which equity holdeth cognizance in its absolute power are such as are not remediable at law; and of them the sorts may be said to be as infinite almost as the different affairs conversant in human life. . . . Equity is so extensive and various that every particular case in equity may be truly said to stand upon its own particular circumstances; and therefore, under favor, I apprehend precedents not of that great use in equity as some would contend, but that equity thereby may possibly be made too much a science for good conscience." In Finch's Law (p. 20) it is said: "The nature of equity is to amplify, enlarge, and add to the letter of the law"; and in the treatise called Eunomus (Dial. 3, § 60) it was called "the power of moderating the *summum jus.*" Lord Bacon adds the weight of his authority to this view, saying in one place: "Habent similiter Curiæ Prætoriæ potestatem tam subveniendi contra rigorem legis, quam supplendi defectum legis" (the court of chancery in like manner has the power as well of relieving against the rigor of the law as of supplying its defects); and in another: "Chancery is ordained to supply the law, and not to subvert the law." Lord Kames states the same theory without any limitation (Kames's Eq., Introd., pp. 12, 15): "It appears now clearly that a court of equity commences at the limits of the common law and enforces benevolence where the law of nature makes it our duty. And thus a court of equity, accompanying the law of nature in its general refinements, enforces every natural duty that is not provided for at the common law. . . . A court of equity boldly undertakes to correct or mitigate the rigor, and what in a proper sense may be termed the injustice, of the common law." In the well-known treatise called Fonblanque on Equity, the author says (b. 1, chap. 1, § 3): "So there will be a necessity of having recourse to natural principles, that what is wanting to the finite may be supplied out of that which is infinite. And this is properly what is called equity, in opposition to strict law. . . . And thus in chancery every particular case stands upon its own particular circumstances; and although the common law will not decree against the general rule of law, yet chancery doth, so as the example introduce not a

§ 47. It is very certain that no court of chancery jurisdiction would at the present day consciously and intentionally attempt to correct the rigor of the law or to supply its defects, by deciding contrary to its settled rules, in any manner, to any extent, or under any circumstances beyond the already settled principles of equity jurisprudence.[a] Those principles and doctrines may unquestionably be extended to new facts and circumstances as they arise, which are analogous to facts and circumstances that have already been the subject-matter of judicial decision, but this process of growth is also carried on in exactly the same manner and to the same extent by the courts of law. Nor would a chancellor at the present day assume to decide the facts of a controversy according to his own standard of right and justice, independently of fixed rules,— he would not attempt to exercise the *arbitrium boni viri;* on the contrary, he is

general mischief. Every matter, therefore, that happens inconsistent with the design of the legislator, or is contrary to natural justice, may find relief here. For no man can be obliged to anything contrary to the law of nature; and indeed, no man in his senses can be presumed willing to oblige another to it. But if the law hath determined a matter with all its circumstances, equity cannot intermeddle." The same large view of equity has sometimes been taken by the earlier judges, but not to any considerable extent since the Reformation. The following example will suffice: In Dudley v. Dudley, Prec. Ch. 241, 244, Sir John Trevor, M. R., said: "Now, equity is no part of the law, but a moral virtue which qualifies, moderates, and reforms the rigor, hardness, and edge of the law, and is a universal truth. It does also assist the law where it is defective and weak in the constitution, which is the life of the law; and defends the law from crafty evasions, delusions, and new subtleties invented and contrived to evade and delude the common law, whereby such as have undoubted right are made remediless. And this is the office of equity, to protect and support the common law from shifts and contrivances against the justice of the law. Equity, therefore, does not destroy the law, nor create it, but assists it." I shall end these citations by a quotation from Chancellor D'Aguesseau, the great French jurist (Œuvres, vol. 1, p. 138): "Premier objet du legislateur, dépositaire de son esprit, compagne inseperable de la loi, l'équité ne peut jamais être contraire à la loi même. Tout ce que blesse cette équité, veritable source de toutes les lois, ne resiste pas moins à la justice."

(a) The text is quoted in Harper v. Clayton, 84 Md. 356, 35 Atl. 1083, 35 L. R. A. 211, 57 Am. St. Rep. 407; Henderson v. Hall, 134 Ala. 455, 32 South. 840; and cited in Sell v. West, 125 Mo. 621, 46 Am. St. Rep. 508, 28 S. W. 969.

governed in his judicial functions by doctrines and rules embodied in precedents, and does not in this respect possess any greater liberty than the law judges.

§ 48. **Theories of the Early Chancellors Concerning Equity.**— It is nevertheless true that there was much in the proceedings of the early clerical and some of the lay chancellors which furnished a ground for the theories given in the foregoing note. In the commencement of the jurisdiction, and down to a time when the *principles* of equity as they now exist had become established, every decision made by chancery, every equitable doctrine which it declared, every equitable rule which it announced, was *of necessity* an innovation to a greater or less extent upon the then existing common law, sometimes supplying defects both with respect to primary rights and to remedies which the law did not recognize, and sometimes invading, disregarding, and overruling the law by enforcing rights or conferring remedies with respect to which the law was not silent, but which it actually denied and refused. The very growth of equity, as long as it was in its formative period, was from its essential nature an antagonism to the common law, either by way of adding doctrines and rules which the law simply did not contain, or by way of creating doctrines and rules contradictory to those which the law had settled and would have applied to the same facts and circumstances. It would be a downright absurdity, a flat contradiction to the plainest teachings of history, to deny that the process of building up the system of equity involved and required on the part of the chancellors an evasion, disregard, and even open violation of many established rules of the common law; in no other way could the system of equity jurisprudence have been commenced and continued so as to arrive at its present proportions.[a]

§ 49. Nor can it be denied that the early clerical and even lay chancellors, in their first processes of innovating upon the law, and laying the foundations of equity, were constantly appealing to and governed by the eternal principles of absolute right, of a lofty Christian morality; that in these principles they sought and found the materials for their decisions; that they were ever guided in their work by *Conscience,* not by what has since been aptly termed the *civil or judicial conscience of the court,* but by their own individual consciences, by their moral sense apprehending what is right and wrong, by their own conceptions of *bona fides.* The very ground of the delegated authority required them to do so, and the function which they possessed and exercised was literally the *arbitrium boni viri.* In this manner the first precedents were made, and undoubtedly for a considerable space of time the decisions in chancery varied and fluctuated according to the personal capacity and high sense of right and justice possessed by individual chancellors. In the lapse of time, however, the precedents had multiplied, and from the universal conservative tendency of courts to be controlled by what has been already decided, a system of doctrines had developed and assumed a comprehensive shape; and finally, when it had attained a reasonable completeness with respect to fundamental principles and general rules, this accumulation became the storehouse whence the chancellors obtained the material for their decisions, and both guided and restrained their judicial action. When this time arrived, all assumption that the Chancellor was to be governed by his own standard and conception of natural justice disappeared from the court of equity, and individual conscience was no longer the motive power in that tribunal. The accuracy of this general account will appear from a brief review of what the early chancellors actually did during the formative period of their jurisdiction, and of the principles which they adopted in the prosecution of their reformatory work.

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[a] The text is quoted in Roberson v. Rochester Folding Box Co., 171 N. Y. 538, 546, 64 N. E. 442, 89 Am. St. Rep. 828, 59 L. R. A. 478, by Parker, C. J.

§ 50. In the original delegation of general authority by the Crown to the Chancellor, over matters falling under the King's judicial prerogative of grace, such authority was to be exercised according to Conscience, Equity, Good Faith, and Honesty. It was undoubtedly a maxim, even in the earliest times, that the equitable jurisdiction of chancery only extended to such matters as *were not remediable by the common law*. At the same time great latitude was used in determining what matters were not thus remediable. The chancellors therefore exercised a jurisdiction which was *supplementary* to that of the law courts, and to this there was never any real opposition. At the same time they exercised a jurisdiction which was *corrective* of the law, and this was undoubtedly the most important part of their functions. It is absolutely certain from all the existing records, and from the result itself of their work, that they did not refrain from deciding any particular case, according to their views of equity and good conscience, merely because the doctrine which they followed or established in making the decision was inconsistent with the rule of law applicable to the same facts, nor because the law had deliberately and intentionally refused to acknowledge the existence of a primary right, or to give a remedy under those facts and circumstances.[1] That this corrective authority was possessed by the chancellors, and freely exercised by them in the periods of which I am speaking, is recognized by the ancient writers.[2]

§ 51. How far the early chancellors went in recognizing and upholding primary rights and granting remedies, which were not only overlooked, but were expressly denied, refused, and prohibited by positive and well-settled rules of the common law, is seen from a brief summary of a few instances in which such equitable doctrines were established in contradiction to legal dogmas. One executor or joint tenant might sue his coexecutor or cotenant in the Court of Chancery in respect to their joint interests, although forbidden to do so by the law.[a] When an obligee, by reason of loss or other accident, could not produce the bond, he was prohibited by an express rule of the law from maintaining an action upon it; but the Court of Chancery, upon proof of such facts, would grant him full relief, by enforcing the obligation. Conversely, if an obligor or other debtor upon a sealed instrument had paid the debt in full, but had neglected to take a release or a surrender of the bond, the law held him still liable, and gave him no defense in an action brought to recover payment of the debt a second time; but chancery admitted and enforced this conscientious defense by restraining the creditor from prosecuting his legal action. Again, the Court of Chancery, acting upon its equitable principles, relieved parties in many instances from forfeitures which had been clearly incurred according to express rules of the law, and which courts of law still enforced according to the strictest letter of the provisions from which they resulted. Notwithstanding statutes which prohibited the Court of Chancery from reviewing judgments rendered by the courts of law, the Chancellor gave relief, where it was demanded by equity and good conscience, against the operation of such judgments. He avoided the express prohibitory language of the statutes by not assuming to act directly upon the judgment itself, but upon the parties personally, by restraining the one who had recovered the judgment from taking or prosecuting any measures for its enforcement, and even by compelling him to restore the property which he had acquired by its means. There is no higher example of the equity jurisdiction than this, nor one which more directly interferes

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[1] Thus in a case before Chancellor Morton, Archbishop of Canterbury, in the reign of Henry VII., it was argued that he should grant no relief, because upon the facts in the case the common law admitted no right and gave no remedy. The Chancellor replied to this argument: "It is so in all cases where there is no remedy at the common law and no right, and yet a good remedy in equity." "*Et per ceo nul remedy per comen ley, ergo ne per consciens, issit est in tout cascs nul remedy per comen ley ne nul droit et uncore bon remedy per consciens*": Year-Book, 7 Hen. VII., fol. 12.

[2] Thus in Doctor and Student, which was written in the early part of the reign of Henry VIII., it is stated: "Conscience (i. e., equity) never *resisteth* the law nor addeth to it, *but only when the law is directly in itself against the law of God or law of reason.*"

(a) The text is cited in Peterson v. Vanderburgh, 77 Minn. 218, 77 Am. St. Rep. 671, 79 N. W. 828.

with the administration of the law, since the legal right controverted and overthrown by chancery no longer existed in the form of an abstract rule, but had been established in a concrete form as the right existing between the parties.

§ 52. In another class of cases, notwithstanding the general maxim that chancery should only have jurisdiction of such matters as were not remediable by the common law, the Chancellor interfered, and extended his authority over facts and circumstances for which a legal remedy *was* provided, and gave a different and more efficient remedy wholly unknown to the common law. The equitable remedy of specific performance of contracts, although the law gave the remedy of damages, is an illustration of this class. The whole doctrine of equity concerning uses, and afterwards concerning trusts, exhibits in the clearest light the action of the Chancellor, not only in supplementing but in evading and contradicting legal rules of the most positive and mandatory character. An estate was recognized and treated as the real, essential interest, which the law ignored; an owner was protected, and his rights of property were enforced, whom the law declared not to be the owner; and as a consequence, the feudal dogmas, the feudal incidents of landed proprietorship, and the right of the feudal lords, all of which the law upheld, were overruled and destroyed. Still another most remarkable illustration of the extent and manner in which the Court of Chancery invaded the rules and contradicted the policy of the common law was exhibited by its doctrine concerning the separate estate of married women, and their power to deal therewith as though they were unmarried. Nothing was more diametrically opposed to the principles of the ancient common law than this capacity to be a separate proprietor conferred upon the wife;[1] and no equitable doctrine perhaps interfered with a greater number of legal rules concerning the *status* of marriage, and the proprietary rights of the husband which it created. The foregoing instances, which have been selected merely as examples, show beyond all possible doubt that the jurisdiction of equity, while passing through its period of growth, was constantly exercised in relaxing, contradicting, and defeating legal rules which were deemed too harsh, unjust, and unconscientious in their practical operation, as well as in supplying omissions, and granting remedies which the law courts were unable to administer.

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[1] This equitable doctrine not only interfered with the legal rules as to property: it contradicted one of the principles which the common law regarded as the foundation of society,— the unity of the family produced by the absolute headship of the husband. *Fleta* (b. iii., chap. 3) expressly states

§ 53. While the early chancellors did much, they stopped very far short of consummating the work of reform by extending it to the entire body of the common law. They left untouched, in full force and operation, a great number of legal rules which were certainly as harsh, unjust, and unconscientious as any of those which they did attack; and their successors upon the chancery bench have never assumed to complete what they left unfinished. That task has since been accomplished, if at all, either by the legislature, or by the common-law courts themselves. Among these legal rules with which equity did not interfere, the following may be mentioned as illustrations: The doctrine by which the lands of a debtor were generally exempted from all liability for his simple contract debts;[1] the entire doctrine of collateral warranty, which was confessedly most unjust and harsh in its operation, and resting wholly upon that kind of verbal reasoning which really had no meaning;[2] and in fact, most of the particular rules concerning real estate, which had been logically derived by the courts of

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the doctrine that conveyance to a stranger for the benefit of a married woman *is void as being against the policy of the law.*

[1] 3 Black. Com., p. 430.

[2] Lord Cowper said of this doctrine, in Earl of Bath v. Sherwin, 10 Mod. 4: "A collateral warranty was certainly one of the harshest and most cruel parts of the common law, because there was no such pretended recompense (as in the case of a lineal warranty); yet I do not find that the court (of chancery) ever gave satisfaction."

law from the feudal institutions and customs. There might, perhaps, have been a sufficient reason for leaving this latter mass of rules, *as such,* untouched. The introduction of uses, and afterwards of trusts, and the invention of the married woman's separate estate, withdrew the greater part of the land, so far as its actual enjoyment and control were concerned, from the operation of the common-law dogmas, and placed it under the domain of equity; and as the Court of Chancery had an exclusive jurisdiction over these new species of estates, and treated them as the true ownerships, and in dealing with them disregarded the most objectionable of the feudal incidents, the chancellors probably thought that these rules of the common law had been practically abrogated, or at least evaded *en masse,* and that there was therefore no necessity for any further attack upon them in detail.

. § 54. Sir William Blackstone, citing these and some other instances in which the Court of Chancery refrained from interfering with legal doctrines, and using them as the basis of his argument, goes to the extent of denying that equity has or ever had any power to correct the common law or to abate its rigor.[1] This is one example among many of

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[1] 3 Black. Com., p. 430. His language is: "It is said that it is the business of a court of equity in England to abate the rigor of the common law. But no such power is contended for. Hard was the case of a bond creditor whose debtor devised away his real estate; rigorous and unjust the rule which put the devisee in a better condition than the heir; yet a court of equity had no power to interfere. Hard is the common law still subsisting that land devised or descending to the heir should not be liable to simple contract debts of the ancestor or devisor, although the money was laid out in the purchase of the very land; and that the father shall never immediately succeed as heir to the real estate of the son. But a court of equity can give no relief, though in both these instances the artificial reason of the law, arising from feudal principles, has long since ceased." The statement in this quotation, that "equity had no power to interfere," is merely a gratuitous assumption; it certainly had the same *power* to interfere which it possessed and exercised in the case of an obligor who had paid the debt secured by his bond but had neglected to take a release. The most that can be truthfully said is, that "equity did not interfere." Blackstone, being purely a common-law lawyer, had little knowledge of equity, and his authority concerning its principles and jurisdiction was never great.

Blackstone's utter inability to comprehend the real spirit and workings of the English law. That equity did to a large extent interfere with and prevent the practical operation of legal rules, and did thus furnish to suitors a corrective of the harshness and injustice of the common law, history and the very existing system incontestably show; and that the chancellors, from motives of policy or otherwise, refrained from exercising their reformatory function in certain instances, is not, in the face of the historical facts, any argument against the existence of the power. And even in the present condition of equity as an established department of the national jurisprudence, whenever a court determines the rights of parties by enforcing an equitable doctrine which differs from and perhaps conflicts with the legal rule applicable to the same facts, such court does still, in very truth, exercise a corrective function, and wield an authority by which it relieves the rigor and often the injustice of the common law. It is undoubtedly true that a court of equity no longer inaugurates new attacks upon legal doctrines, and confines itself to the application of principles already settled; but it is none the less true that a large part of the equity which is daily administered consists in doctrines which modify and contradict as well as supplement the rules of the law.[2]

§ 55. **Sources from Which the Early Chancellors Took Their Doctrines.**— Having thus described the action of the early chancellors in the formative period of their jurisdiction, I shall now endeavor to explain the motives by which they were governed, and the speculative sources whence they drew their principles and constructed their doctrines. They were directed in their original delegation of authority, and they assumed, in compliance with the direction, to proceed according to Equity and Conscience. There can be no doubt that they took their conception of equity from the general description of it given by the Roman jurists, *understood and interpreted, however, according to their own theory of morality as a Divine law*, and also borrowed many of the particular rules by which this equity was applied from the Roman law. As the great Roman jurists, disciples of the Stoic philosophy, conceived of *Æquitas* as synonymous with the " natural law," or " *lex naturæ*," the governing spirit or reason of the universe (*ratio mundi*), and regarded it as a constituent part of their national system, so the clerical chancellors, interpreting the language of the Roman jurists according to their own Christian philosophy, conceived of equity as synonymous with the Divine law of morality, and therefore as compulsory upon human tribunals in their work of adjudicating upon the civil rights and regulating the personal conduct and relations of individuals. In this view, the authority and duty to decide according to equity (as distinguished from conscience) seems to have embraced all those cases in which a party, without having committed any act which would be considered as contrary to conscience or good faith, might yet, by the rigorous provisions of the positive law, or by its silence,— the particular case not having been provided for at all,— have obtained an advantage which it was contrary to the principles of equity that he should be permitted to enforce or to retain. In such cases, the general principles of equity, which were found in the rules of morality, and were superior to all merely human law, were invoked. If the rigor of the law favored the position of a party who had committed any unconscientious act or breach of good faith, the one who had suffered thereby would be relieved under the head of " conscience " as well as of " equity."[1]

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[2] See *dictum* of Sir George Jessel, M. R., in Johnson v. Crook, L. R. 12 Ch. Div. 639, 649, quoted *post*, in note to § 62.

§ 56. The conception of " Conscience " as an element in determining jural relations was wholly due to the clerical courts. In its practical operation and results, however, conscience, considered as a source of the equity jurisdiction, was synonymous with the "good faith," "*bona fides,*" which forms so important a feature in the later and philosophical Roman jurisprudence. It embraced all those obligations which rested upon a person who, from the circumstances in which he was placed towards another and the relations subsisting between them, was bound to exercise good faith in his conduct and dealings with that other person. Under the head of conscience as thus understood, a wide field of jurisdiction was opened, which included all departures from honesty and uprightness.[1]

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[1] See 1 Spence's Eq. Jur., pp. 412, 413.

§ 57. The question is naturally suggested, whether this "conscience" was interpreted as the personal conscience of the individual chancellor, or whether it was a kind of *judicial* conscience, limited by and acting according to definite rules, and constituting a fixed and common standard of right recognized and followed by all the equity judges. Beyond a doubt, during the infancy of the jurisdiction, the former of these conceptions was the prevailing one, and each Chancellor was governed in his judicial work by his own notions of right, good faith, and obligation, by his own interpretation of the Divine code of morality. Even during the reigns of Henry VIII. and of Elizabeth, some of the chancellors seem to have taken a view of their authority which freed them from the restraints of precedent and even of principle, and enabled them to decide according to their private standard of right. It was this mistaken theory, so satisfying to an ambitious and self-reliant judge, but so dangerous to the equable and certain administration of justice, which provoked the sarcastic criticism of Selden so often quoted, and so often applied, in complete ignorance either of the subject or the occasion, to the equity jurisdiction in general.[1] After the period of infancy was

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§ 56, [1] See 1 Spence's Eq. Jur., p. 411.

§ 57, [1] Table Talk, tit. Equity: "Equity is a roguish thing. For law we have a measure, and know what we trust to. Equity is according to the conscience of him that is Chancellor; and as that is larger or narrower, so is equity. 'T is all one as if they should make his foot the standard for the measure passed, and an orderly system of equitable principles, doctrines, and rules began to be developed out of the increasing mass of precedents, this theory of a personal conscience was abandoned; and the " conscience " which is an element of the equitable jurisdiction came to be regarded, and has so continued to the present day, as a metaphorical term, designating the common standard of civil right and expediency combined, based upon general principles and limited by established doctrines, to which the court appeals, and by which it tests the conduct and rights of suitors,— a juridical and not a personal conscience.[a] This theory was at length announced by Lord Nottingham as the one which regulated the equity jurisdiction: " With such a conscience as is only *naturalis* and *interna,* this court has nothing to do; the conscience by which I am to proceed is merely *civilis* and *politica,* and tied to certain measures."[2]

§ 58. After " conscience " became thus defined as a common civil standard, it was practically the same as "equity;" the distinctions between them had disappeared, and both terms were and have since been used interchangeably. From the time of Henry VI., precedents of decisions made in the Court of Chancery were recorded in the Year-Books, and special collections of them were made in the reigns of Elizabeth, James I., and Charles I. By the time of Charles I. the number of precedents had so accumulated, either in published or in private collections, or handed down traditionally, that they substantially contained the entire principles of equity, and the chancellors yielded almost wholly to

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we call a Chancellor's foot. What an uncertain measure would this be! One Chancellor has a long foot, another a short foot, a third an indifferent foot. 'T is the same thing in the Chancellor's conscience." Mr. Spence very truly remarks: " Selden, better than any man living, perhaps, knew what equity really was."

[2] Cook v. Fountain, 3 Swanst. 585, 600 (1676).

[a] The text is quoted in Roberson v. Rochester Folding Box Co., 171 N. Y. 538, 546, 64 N. E. 442, 89 Am. St. Rep. 828, 832, 59 L. R. A. 478, by Parker, C. J.

their guidance. In fact, they sometimes fell into the mistake of refusing relief in a case plainly within the scope of established principles, because there was no precedent which exactly squared with the facts in controversy.

§ 59. **Equity Finally Established upon a Basis of Settled Principles.**— The result of this review is very clear, and enables us to define with accuracy the general character of the English and American equity. After its growth had proceeded so far that its important principles were all developed, equity became a system of positive jurisprudence, peculiar indeed, and differing from the common law, but founded upon and contained in the mass of cases already decided. The Chancellor was no longer influenced by his own conscience, or governed by his own interpretation of the Divine morality. He sought for the doctrines of equity as they had already been promulgated, and applied them to each case which came before him. No doubt (and this is a point of the highest importance) the system was, and is, much more elastic and capable of expansion and extension to new cases than the common law. Its very central principles, its foundation upon the eternal verities of right and justice, its resting upon the truths of morality rather than upon arbitrary customs and rigid dogmas, necessarily gave it this character of flexibility, and permitted its doctrines to be enlarged so as to embrace new cases as they constantly arose. It has, therefore, as an essential part of its nature, a capacity of orderly and regular growth,— a growth not arbitrary, according to the will of individual judges, but in the direction of its already settled principles. It is ever reaching out and expanding its doctrines so as to cover new facts and relations, but still without any break or change in the principles or doctrines themselves. It is certainly, therefore, a mistaken theory which is maintained by many writers like Blackstone, and even by those of a later day and higher authority, and which represents the English and American equity as entirely an artificial system, embodied wholly in unyielding precedents, and incapable of further development. It is true that there can be no more capricious enlargement according to the will of individual chancellors; but the principles of right, justice, and morality, which were originally adopted, and have ever since remained, as the central forces of equity, gave it a necessary and continuous power of orderly expansion, which cannot be lost until these truths themselves are forgotten, and banished from the courts of chancery.[1]

§ 60. The general language of some writers, and particularly of Blackstone, presents an erroneous theory as to the office of precedents in equity, and if followed, would check and abridge the beneficent operation of its jurisdiction. The true function of precedents is that of illustrating principles; they are examples of the manner and extent to which principles have been applied; they are the landmarks by which the court determines the course and direction in which principles have been carried. But with all this guiding, limiting, and restraining efficacy of prior decisions, the Chancellor always has had, and always must have, a certain power and freedom of action, not possessed by the courts of law, of adapting the doctrines which he administers. He can extend those doctrines to new relations, and shape his remedies to new circumstances, if the relations and circumstances come within the principles of equity, where a court of law in analogous cases would be powerless to give any relief. In fact, there is no limit to the various forms and kinds of specific remedy which he may grant, adapted to novel conditions of right and obligation, which are constantly arising from the movements of society. While it must be admitted that the broad and fruitful principles of equity have been established, and cannot be changed by any judicial action, still it should never be forgotten that these principles, based as they are upon a Divine morality, possess an inherent vitality and a capacity of expansion, so as ever to meet the wants of a progressive civilization. Lord Hardwicke, who was, I think, the greatest of the English chancery judges, and who, far more than Lord Eldon, was penetrated by the genius of equity, indicated the true theory in a letter to Lord Kames: "Some general rules there ought to be, for otherwise the great inconvenience of *jus vagum et incertum* will follow. And yet the Prætor [Chancellor] must not be so absolutely and invariably bound by them as the judges are by the rules of the common law. For if he were so bound, the consequence would follow that he must sometimes pronounce decrees which would be materially unjust, since no rule can be equally just in the application to a whole class of cases that are far from being the same in every circumstance.[1]

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[1] The doctrine of the text was clearly stated by Lord Redesdale, in Bond v. Hopkins, 1 Schoales & L. 413, 429: "There are certain principles on which courts of equity act, which are very well settled. The cases which occur are various, but they are decided on fixed principles. Courts of equity have in this respect no more *discretionary* power than courts of common law. They decide new cases as they arise, by the principles on which former cases have been decided, *and may thus illustrate or enlarge the operation of these principles*, but the principles are as fixed and certain as the principles on which the courts of common law proceed." In Gee v. Pritchard, 2 Swanst. 402, 414, Lord Eldon states the same theory: "The doctrines of this court ought to be as well settled and made as uniform *almost* as those of the common law, *laying down fixed principles, but taking care that they are to be applied according to the circumstances of each particular case.*" The old case of Fry v. Porter, 1 Mod. 300, 307 (22 Car. II.), exhibits the strange notions concerning equity then held by the common-law judges. On the hearing, Chief Justice Keylinge, Chief Justice Vaughan, and Chief Baron Hale were called in to assist. During the argument C. J. Keylinge cited an old case; at which C. J. Vaughan said: "I wonder to hear of citing precedents in matter of equity, for if there be equity in a case, that equity is a universal truth, and there can be no precedent in it, so that in any precedent that can be produced, if it be the same with this case, the reason and equity is the same in itself; and if the precedent be not the same case with this, it is not to be cited." To this Lord Keeper Bridgman replied: "Certainly, precedents are very necessary and useful to us, for in them we may find the reasons of the equity to guide us; and besides, the authority of those who made them is much to be regarded. We shall suppose that they did it upon great consideration and weighing of the matter, and it would be very strange and very ill if we should disturb and set aside what has been the course for a long series of time and ages."

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[1] Parke's History of Chancery, pp. 501, 506. Judge Story severely criticises this language, pronounces it very loosely said, and virtually repudiates it. But with all deference to Judge Story, these few sentences, although

§ 61. I have thus far described the growth of equity, and the shape which it finally assumed in the English Municipal Law, and as it was thence borrowed by the American states, with but little reference to judicial opinions. I have supplied this intentional omission by collecting in the foot-note a number of extracts in which eminent judges have expressed their conceptions of its nature. Some of these judges have attempted to place the subject upon a broad and secure foundation. While there is a general unanimity in their views, it is still impossible to reconcile all the judicial opinions, and some of them maintain a theory of the jurisdiction which is certainly too partial and restricted.[1]

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undoubtedly not written in a scientific form, contain the central truth of the system, the truth which must always be recognized and acted upon in the administration of equity. Lord Hardwicke does not deny the existence nor the necessity of general principles, — no other Chancellor was ever more governed in his judicial work by principles, — but he would guard against the theory which locks these principles up in the already existing precedents, and limits their free application to facts, circumstances, and relations similar to those which had been the subject-matter of former adjudications. In other words, Lord Hardwicke in this short passage states the same view which I had given in the text. Although equity is and long has been in every sense of the word a system, and although it is impossible that any *new* general principles should be added to it, yet the truth stands, and always must stand, *that the final object of equity is to do right and justice.*

[1] In Cowper v. Cowper, 2 P. Wms. 720, 753, Sir Joseph Jekyl, M. R., defined the scope and powers of equity as follows: "The law is clear, and courts of equity ought to follow it in their judgments concerning titles to equitable estates; otherwise great uncertainty and confusion would ensue. And though proceedings in equity are said to be *secundum discretionem boni viri*, yet when it is asked, *Vir bonus est quis?* the answer is, *Qui consulta patrum, qui leges juraque servat.* (Who is the good man? He who maintains the opinions of his predecessors, and the laws and decisions.) And it is said in Rook's Case, 5 Coke, 99b, that discretion is a science not to act arbitrarily, according to men's wills and private affections. So the discretion which is executed here is to be governed by the rules of law and equity, which are not to oppose, but each in its turn to be subservient to, the other. This discretion, in some cases, follows the law implicitly; in others, assists it and advances the remedy; in others, again, it relieves against the abuse, or allays the rigor of it; *but in no case does it contradict or overturn the grounds or principles thereof*, as has been sometimes ignorantly imputed to this court. That is a discretionary power which neither this nor any other court, not even the highest, acting in a judicial capacity, is by the con-

§ 62. How the Equitable Jurisdiction is Determined at the Present Day.— Although the jurisdiction of chancery was originally based in great measure upon the omissions of

stitution entrusted with." This language was expressly adopted and approved by Sir Thomas Clarke, M. R., in Burgess v. Wheate, 1 W. Black. 123, 152. The general propositions at the beginning of this extract are undoubtedly correct; but it is strange that, in the face of the equitable doctrines concerning uses and trusts, or the separate estates of married women, or the enforcing of contracts void by the statute of frauds, or the relief anciently given to an obligor who had paid the debt without taking a release, and numerous other instances, some of which have been mentioned in the text,— it is strange, I say, in the face of all these facts, that an equity judge could lay down a proposition so palpably untrue as the one just quoted, that *in no case* does equity contradict or overturn the grounds and principles of the law; a great part of its doctrines being in direct contradiction to the rules of law governing the same circumstances at the time when these doctrines were first enunciated. Lord Hardwicke, who always looked at the reality, and not at mere conventional formulas, stated the true relation between equity and the law in a short but pregnant proposition. It being argued in a case before him that equity follows the law, *Æquitas sequitur legem*, he replied: "When the court finds the rules of the law *right* it will follow them; but then it will likewise go beyond them": Paget v. Gee, Ambl. App. 807, 810. In the case of Manning v. Manning, 1 Johns. Ch. 530, Chancellor Kent explained his own position as an American chancellor, and his conception of equity as a whole: "I take this occasion to observe that I consider myself bound by these principles, which were known and established as law in the courts of equity in England at the time of the institution of this court, and I shall certainly not presume to strike into any new path with visionary schemes of innovation and improvement; *Via antiqua via est tuta*. . . . This court ought to be as much bound as a court of law by a course of decisions applicable to the case, and establishing a rule. As early as the time of Lord Keeper Bridgman, it was held that precedents were of authority (1 Mod. 307. See the citation *ante*, in the note under § 59). The system of equity principles which has grown up and become matured in England, and chiefly since Lord Nottingham was appointed to the custody of the great seal, is a scientific system, being the result of the reason and the labors of learned men for a succession of ages. It contains the most enlarged and liberal views of justice, with a mixture of positive and technical rules founded in public policy, and indispensable in every municipal code. It is the duty of this court to apply the principles of this system to individual cases as they may arise, and by this means endeavor to transplant and incorporate all that is applicable in that system into the body of our own judicial annals, by a series of decisions at home." The propositions here quoted are undoubtedly true, and yet the feeling cannot be avoided that they do not represent the *entire* truth. The character of Chancellor Kent's mind was eminently conservative; and this conservative tendency has led him to suppress, or at least to refrain from *expressing*, the element of vitality and expansion which inheres in the system, and the power of the court in its the common law, the injustice of many of its rules, and its inability, from its modes of procedure, to grant the variety of remedies adequate to the wants of society and the demands of justice, yet since the equitable system has become fully established, and its principles settled, this *origin* of the jurisdiction is no longer regarded as furnishing the *real* criterion. The whole question by which the extent of the equity jurisdiction is *practically* determined is no longer, whether the case is omitted by the law, or the legal rule is unjust, or even the legal remedy is inadequate,— although the latter inquiry is still sometimes made and treated as though it were controlling,— the question is, rather, whether the circumstances and relations presented by the particular case are fairly embraced within any of the settled principles and heads of jurisdiction which are generally acknowledged as constituting the department of equity.[1] Two results therefore follow: *First,*

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fullness to enlarge the equitable principles, to extend them over new facts and relations, and to render them fruitful in the constant production of new rules.

[1] The position which I maintain is well illustrated by a *dictum* of Jessel, M. R., — one of the most clear-headed and able judges of this generation, — in the recent case of Johnson v. Crook, L. R. 12 Ch. Div. 639, 649. He is discussing the question whether a certain rule of equity jurisprudence had been established, and has cited a series of decisions to show that it had not been established, but that the contrary rule had been acted upon. He then adds: "Having examined all the authorities, I cannot find a trace of it (i. e., the rule in question) before the case I am about to mention, and therefore if there is such a law it must have been made in the year 1866. Now, it could only have been made in the year 1866 by statute, because in the year 1866 equity judges did not profess to *make new law,* and when they state what the law is, they do not mean, as might have been said two or three centuries before, that that was law which they thought *ought* to be law." To avoid a misunderstanding of this position, it must be remembered that I am speaking of the equity system *as a whole,* as it exists in England, and in those American states which have clothed their courts with the entire equitable jurisdiction of the chancery. In several of the states, a partial jurisdiction only has been granted, and it is by the express language of the statutes restricted to those cases in which an adequate remedy cannot be obtained at law. In giving a construction to this legislation, the question whether the legal remedy is adequate becomes of great practical importance. This subject, as to the extent of the jurisdiction, which is here merely alluded to, will be fully examined in a subsequent chapter.

a court of equity will not, unless perhaps in some very exceptional case, assume jurisdiction over a controversy the facts of which do not bring it within some general principle or acknowledged head of the equitable jurisprudence; and *secondly,* if the circumstances do bring the case within any of these principles or heads, a jurisdiction over it will be maintained, although the *law* may have been so altered by judicial action or by positive legislation that it has supplied the original omission, or has brought the legal rule into a conformity with justice, or has furnished an adequate legal remedy. This latter proposition is true as the general doctrine concerning the extent of the equity jurisdiction, but its operation has sometimes been prevented, and the jurisdiction itself denied, in such cases by express statute.[2]

§ 63. **Recapitulation: Nature of Equity Stated in Four Propositions.**— I shall bring this examination into the general nature of equity to an end by formulating four distinct propositions: 1. The moral law, as such, is not an element of the human law. Whatever be the name under which it is described,— the moral law, the natural law, the law of nature, the principles of right and justice — this code, which is of divine origin, and which is undoubtedly compulsory upon all mankind in their personal relations, is not *per se* or *ex proprio vigore* a part of the positive jurisprudence which, under the name of the municipal law, each independent state has set for the government of its own body politic. This truth, so simple and so plain, and yet so often forgotten by text-writers and judges, removes at once all doubt and difficulty from a clear conception of the positive human law, and of its relations with the higher and divine law which we call morality. Speculative writers upon the natural law may well see in it the foundation of all perfected human legislation, and it is not surprising that they should confound the two. It is surprising that those who treat of the human jurisprudence alone, and especially those who administer that jurisprudence, should confound the commands uttered by the divine Law-giver with those issued by human law-makers. It is true that many of the precepts of this moral code relate to mankind considered as members of an organized society,— the state,— and prescribe the obligations which belong to them as component parts of a national body; and therefore these precepts are *jural* in their nature and design, and the duties which they impose upon individuals are of the same kind as those imposed by the human authority of the state. It is also true that human legislation ought to conform itself to and embody these jural precepts of the moral code; every legislator, whether he legislate in a Parliament or on the judicial bench, ought to find the source and material of the rules he lays down in these principles of morality; and it is certain that the progress towards a perfection of development in every municipal law consists in its gradually throwing off what is arbitrary, formal, and unjust, and its adopting instead those rules and doctrines which are in agreement with the eternal principles of right and morality. But it is no less true that until this work of legislation has been done, until the human law-giver has thus borrowed the rules of morality, and embodied them into the municipal jurisprudence by giving them a human sanction, morality is not binding upon the citizens of a state as a part of the law of that state. In every existing municipal law belonging to a civilized nation, this work of adaptation and incorporation has been performed to a greater or less degree.

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[2] In support of the general doctrine, see Shotwell v. Smith, 20 N. J. Eq. 79; Segar v. Parish, 20 Gratt. 672; Pratt v. Pond, 5 Allen, 59; King v. Baldwin, 2 Johns. Ch. 554; Cannon v. McNab, 48 Ala. 99; Collins v. Blantern, 2 Wils. 341; Bromley v. Holland, 7 Ves. 19, 21; Atkinson v. Leonard, 3 Brown Ch. 218. But, *per contra,* see Ainsley v. Mead, 3 Lans. 116; Hall v. Joiner, 1 Rich., N. S., 186; Riopelle v. Doellner, 26 Mich. 102.

§ 64. 2. Another very large portion of the precepts of morality are not *jural* in their nature; they do not relate to mankind considered as forming a society, as organized into a state, but only to individuals, prescribing their personal duties towards each other and towards God. These moral precepts create obligations resting upon separate persons, which the state and human law do not and cannot recognize or enforce; and they are left to be enforced solely by the divine sanction, acting in and upon the conscience of each person. Such obligations are often called "imperfect," which is in every point of view a very incorrect and misleading designation. Regarded as parts of the divine code of morals, and as enforced by the divine sanction, they are as "perfect" and binding as any others; considered as parts of human jurisprudence to be enforced by human sanction, they are not simply imperfect, but are absolutely non-existent; they are no obligations at all. With this entire class of moral rules and precepts the law of the state does not and cannot deal: they do not act within the sphere of human legislation; they are not jural principles. The question then arises, Does the system of equity established in the United States and in England contain *all* the jural principles of morality which have been borrowed and incorporated into the municipal jurisprudence? The answer to this inquiry is contained in the two following propositions.

§ 65. 3. "Equity" alone does not embrace all of the jural moral precepts which have been made active principles in the municipal jurisprudence. The "law," even the "common law," as distinct from statutory legislation, has in the course of its development adopted moral rules, principles of natural justice and equity, notions of abstract right, as the foundation of its doctrines, and has infused them into the mass of its particular rules. Unquestionably at an early day the common law of England had comparatively little of this moral element; it abounded in arbitrary dogmas, as, for example, the effect given to the presence or absence of a seal; but this was the fault of the age, and the sin was chiefly one of omission; the ancient law was, after all, rather *unmoral* than *immoral.* But this has been changed, and at the present day a large part of the " law " is motived by considerations of justice, based upon notions of right, and permeated by equitable principles, as truly and to as great an extent as the complementary department of the national jurisprudence which is technically called " equity." This work of elevating the law has been accomplished by two distinct agencies, judicial legislation and parliamentary legislation. At the present day the latter agency is the most active and by far the most productive; but prior to the epoch of conscious legal reform, which began in England about 1830, and at a considerably earlier day in this country, the great work of legislation within the domain of the private law, except in a few prominent instances, such as the Statute of Uses, of Wills, etc., was done by the law courts. In expanding the law, the judges in later times have designedly borrowed the principles from the moral code, and constructed their rules so as to be just and righteous. The legislature also has conformed the modern statutes to the precepts of a high morality, and their legislation has tended to correct any mistakes and to supply any omissions in the body of rules constructed by the legislative function of the courts.

§ 66. While the foregoing description is true of a large portion of the " law," it is also true that from the very necessities of the case there is another large part of the law which is and must be founded upon expediency rather than upon morality. The influence of ancient institutions, the motives of policy, the primary importance of certainty, the necessity of rules which shall correspond with the average conduct of men,— such, for example, as many rules of presumption which may produce great wrong in particular cases,— these and other facts of equal importance must exist in every society, and must prevent a determinate part of its law from being constructed upon a basis of morality, and from admitting the creative force of purely moral principles. This inherent necessity of a constituent part which is arbitrary and expedient, rather than just and righteous, is a most important distinction between the " law " and " equity." The element, however, of the English and American law, which has operated by far the most powerfully to retard its development in the direction of morality, which has placed an insuperable barrier to its perfected growth, which has rendered it incomplete as an embodiment of jural rights, unable to administer justice to the citizen in all his relations, and unequal to the needs of society, has been and is its mode of procedure, its remedial system as a whole. This narrow, technical, arbitrary procedure, admitting growth in only one direction, granting but few remedies, and incapable of enlarging their number or changing their nature, was the fact which more than all else made it impossible for the " law " to borrow *all* the jural precepts of the moral code, incorporate them into its own rules, and administer the full remedial justice which these equitable principles demanded. The legal growth was stunted, its development was checked, its tendencies to do justice in all the private relations of society were thwarted by its partial remedies and its imperfect means of administering them. From this cause the necessity of a distinct department of equity, with its own mode of procedure, and with absolute freedom and elasticity in the forms of its remedies, and their adaptation to the rights and duties of parties, has continued to the present day, and must continue until the principles and rules of the common-law remedial system are utterly abandoned.[1]

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[1] I quote the following passage from Mr. Snell's Principles of Equity (Introd., pp. 2, 3), which expresses substantially the same theory as that given in the text: "Are we, then, to infer that the equity of our Court of Chancery represents the residue of natural equity, or, to put it conversely, the whole of that portion of natural equity which may be enforced by legal sanctions, and administered by legal tribunals? The slightest acquaintance with English jurisprudence will show us that were we to arrive at this conclusion, we should ignore the claims of the common law and the statute law. Although, when we make use of the term 'common law,' we use it as contradistinguished from equity, technically so called, that circumstance should by no means blind us to the fact that in the main the common law

§ 67. 4. As the expansive tendencies of the common law are thus confined within certain limits, and as its power to administer justice and to grant the variety of remedies needed in the manifold relations of society is incomplete, the English and American system of equity is preserved and maintained to supply the want, and to render the national jurisprudence as a whole adequate to the social needs. It is so constructed upon comprehensive and fruitful principles, that it possesses an inherent capacity of expansion, so as to keep abreast of each succeeding generation and age. It consists of those doctrines and rules, primary and remedial rights and remedies, which the common law, by reason of its fixed methods and remedial system, was either unable or inadequate, in the regular course of its development, to establish, enforce, and confer,

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is a system as much founded on the basis of natural justice and good conscience as our equity system; that if it has fallen short in its operation, its failure is rather to be attributed to defects in the modes of administering those principles than to any inherent weakness or deficiency of the principles themselves. Clearly, therefore, another large portion of enforceable equity, often enfeebled though it be by a defective mode of administration, is to be found in the common law. And finally, we must look to the enactments of the legislature, the statute law, as embodying and giving legal sanction to many of those principles of natural equity which, though capable of being administered by courts, have been omitted to be recognized as such, — an omission arising from that tendency of all human institutions founded on a body of principles to assume a defined and solidified mass, refusing to receive further accessions even from a cognate source, and thus to become after a time incapable of expansion. Having thus mapped out the whole area of what is termed natural justice, — having seen that a large portion of it cannot be enforced at all by civil tribunals, that another large section of it is administered in courts of common law, and a third part enforced by legislative enactments, — we are in a position to indicate approximately the province of equity, technically so termed. Putting out of consideration all that part of natural equity sanctioned and enforced by legislative enactments, equity may then be defined as that portion of natural justice which, though of such a nature as properly to admit of its being judicially enforced, was, from circumstances, omitted to be enforced by common-law courts, — an omission which was supplied by the Court of Chancery. In short, the whole distinction between equity and law may be said to be, not so much a matter of substance or principle as of form and history." These concluding sentences hardly contain an adequate conception of the English and American equity.

and which it therefore either tacitly omitted or openly rejected. On account of the somewhat arbitrary and harsh nature of the common law in its primitive stage, these doctrines and rules of equity were intentionally and consciously based upon the precepts of morality by the early chancellors, who borrowed the jural principles of the moral code, and openly incorporated them into their judicial legislation. This origin gave to the system which we call equity a distinctive character which it has ever since preserved. Its great underlying principles, which are the constant sources, the never-failing roots, of its particular rules, are unquestionably principles of right, justice, and morality, so far as the same can become the elements of a positive human jurisprudence; and these principles, being once incorporated into the system, and being essentially unlimited, have communicated their own vitality and power of adaptation to the entire branch of the national jurisprudence of which they are, so to speak, the substructure. It follows that the department which we call equity is, as a whole, more just and moral in its creation of right and duties than the correlative department which we call the law. It does not follow, however, that the equity so described is absolutely identical with natural justice or morality. On the contrary, a considerable portion of its rules are confessedly based upon expediency or policy, rather than upon any notions of abstract right.

SECTION III.

THE PRESENT RELATIONS OF EQUITY WITH THE LAW.

ANALYSIS.

§ 68. Importance of correctly understanding these present relations.
§ 69. Changes in the relations of equity to the law effected partly by statute and partly by decisions.
§§ 70–88. Important instances of such changes in these relations.
§ 70. In legal rules concerning the effect of the seal.
§ 71. *Ditto* suits on lost instruments.
§ 72. *Ditto* forfeitures and penalties.
§§ 73, 74. *Ditto* mortgages of land.
§ 75. In statutes concerning express trusts.
§ 76. *Ditto* recording and doctrine of priorities.
§ 77. *Ditto* administration of decedents' estates.
§ 78. *Ditto* jurisdiction over infants.
§§ 79, 80. *Ditto* married women's property.
§ 81. In statutory restrictions upon the equitable jurisdiction.
§§ 82, 83. In the practical abolition of the "auxiliary" jurisdiction.
§§ 84–88. In the Reformed Procedure combining legal and equitable methods.

§ 68. **Importance of Correctly Understanding These Present Relations.**— In accounting for the historical origin of equity, and in describing its general nature, it is necessary to go back to the period of its infancy and early growth, when the common law was also in its primitive and undeveloped condition. We thus naturally form a picture of the two systems standing in marked contrast and even opposition, acknowledging different sources, controlled by different principles, exhibiting different tendencies, each complete in itself and independent of the other. The impression which is thus obtained of their relations is too apt to be retained in describing the equity as it has existed at subsequent times, and even as it exists at the present day. The effect of such a tendency to confuse different epochs and conditions is shown in some of the treatises upon equity jurisprudence, which tacitly assume that all of the original antagonism still prevails, and which, ignoring the great and often radical changes made in the law, discuss their subject-matter as though the relations between law and equity continued to be the same as they were in the reign of Charles II., or even later, in the reigns of George III. and George IV., and under the chancellorships of Lord Thurlow and Lord Eldon,— as though all the harsh, arbitrary, unjust rules which then disgraced the law remained unmodified. Such neglect to appreciate the actual condition of the law will lead to the useless discussion of equitable doctrines which have become obsolete, since all occasion for their application has been removed, and will produce, almost as a matter of course, a distorted representation of equity as a whole. In order, therefore, to form an accurate notion of equity, its present relations with the law must be carefully observed, and to that end the changes which have been made in the law itself, and which have modified those relations, must be pointed out at every stage of the discussion. Without undertaking to give an exhaustive enumeration, or any detailed description, I shall simply mention some of the most important classes of alterations which have been made in the law since the principles and doctrines of equity were definitely settled.

§ 69. **Changes in the Relations of Equity to the Law.**— These changes have certainly been very great. They have been effected, *first*, by the legislative work of the common-law courts; and *secondly*, by statutory legislation. Since the doctrines of equity began to react upon the law, and especially since the impulse given by the brilliant career of Lord Mansfield, the common-law courts have consciously adopted and applied, as far as possible, purely equitable notions — not so much the technical equity of the Court of Chancery, but the principles of natural justice — in their decision of new cases, and in the development of the law, until a large part of its rules are as truly equitable and righteous in their nature as those administered by the Chancellor. From time to time, the legislature has interposed, and by occasional statutes has aided this work of reform. During the past generation, since about 1830 in England, and an earlier date in the United States, this legislative process of amendment has been more constant, more systematic, and more thorough, extending to all parts of the law, and has been the chief agency in the work of legal reform. The result is, that many doctrines and rules which were once exclusively recognized and enforced by chancery have become incorporated into the law, and are now, and perhaps long have been, administered by the law courts in the decision of cases. In this manner, the law has been brought at many points into a coincidence with equity. Nor has the legislative work been confined to the law; it has largely acted upon the system of equity, and has brought that system into a closer resemblance, external at least, with the law. These changes have naturally gone much further in the United States than in England; the law has been more essentially altered, and equity itself has been subjected to more limitations. The following instances are taken from the legislation, statutory or judicial, of this country.

§ 70. 1. **Effect of a Seal.**— One of the earliest instances of equity breaking in upon the common law was the relief which it gave to a debtor on a sealed instrument who had paid the debt in full, but had neglected to obtain a release or a surrender up of the contract. The legal rule was, that a sealed instrument could only be discharged by another instrument of as high a character, or else by a surrender of it, so that the creditor could not " make profert " of it in an action at law. Equity justly regarded the debt as the *real* fact, its payment as a satisfaction, and the seal as a mere form. It therefore relieved the debtor who had thus paid, and against whom an action at law was brought on the obligation, by restraining this action; and the debtor was thus practically safe, although technically his legal liability still subsisted. Generalizing this particular rule, equity never gave the consequence to a seal which the common law gave; it always looked below this mere form into the real relations of the parties, and rejected the dogma that a seal can only be discharged by an act of equal degree.

These equitable doctrines have been transferred into the "law" of the United States. The special head of equitable relief first mentioned has become utterly obsolete, since the defense of payment in such cases has long been admitted by the common-law courts. In most of the states all distinction between sealed and unsealed instruments is abolished, except so far as the statute of limitations operates to bar a right of action; in others, the only effect of the seal upon executory contracts is to raise a *prima facie* presumption of a consideration, while it is still required on a conveyance of land; in a very few, the common-law rule is retained, which makes the seal conclusive evidence of a consideration.[1] By this legislation, all the distinction between the legal and the equitable doctrines concerning contracts and other rights, except those growing out of a conveyance of land, founded upon the presence or absence of the seal, has been abrogated. The equitable doctrines, of course, remain, but they have become a part of the law, and no necessity remains of applying to courts of equity for their enforcement. Even the equitable rule permitting a sealed agreement to be modified or replaced by subsequent parol contract is generally adopted by the law courts, except in cases where the statute of frauds prevents its operation.[2]

§ 71. 2. **Lost Instruments.**— By another ancient doctrine of the common law, the creditor on a sealed instrument which had been lost or accidentally destroyed was prohibited from maintaining an action upon it, because he could not make the "profert" which the inflexible rules of the legal procedure required. Equity, disregarding this form, gave him relief by enforcing the demand. At a latter day, when negotiable paper came into use, the owner of a bill or note so drawn that it could be negotiated by delivery, who had lost it, was debarred from suing upon it at law, because the common-law courts had no means, according to their rigid forms of procedure, of compelling him to indemnify the defendant against a second claim made by any *bona fide* holder into whose hands the paper might have come. As the Court of Chancery has such power, through its ability to shape its remedial processes so as to meet any new emergency, it acquired jurisdiction in this class of cases, and for a long time all suits upon such lost negotiable paper were necessarily brought in equity. Both of these legal rules have been changed. The courts of law have long been able to entertain actions upon lost or destroyed bonds and other sealed instruments, since the ancient requirement of a profert by the plaintiff has been abrogated. Statutes have generally been enacted in the American states which permit actions at law on lost negotiable paper to be brought by the owner, who is simply required, as a preliminary step, to execute and file a bond of indemnity to the defendant.[1] In this manner the necessity for equitable interference has been removed, and all such actions to recover a money judgment upon lost obligations or negotiable instruments are brought in courts of law according to the legal modes of procedure.[a]

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[1] In some states the seal is only presumptive evidence of a consideration: See *New York*, 2 R. S. 406, § 77; *Alabama*, Rev. Code (1867), p. 526, § 2632; *Michigan*, Comp. Laws (1871), vol. 2, p. 1710, § 90; *Oregon*, Gen. Laws (1872), p. 258, § 743; *Texas*, Pasch. Dig., vol. 1, § 228. In many states all distinction between sealed and unsealed instruments is abolished, and a seal is never essential; See *California*, Civ. Code, § 1629; *Indiana*, 2 R. S. (G. & H.), p. 180, § 273; *Iowa*, Rev. Code (1873), p. 383, §§ 2112–2114; *Kansas*, Gen. Stats. (1868), p. 183, §§ 6–8; *Kentucky*, 1 R. S. (Stanton's), p. 267, §§ 2, 3; *Nebraska*, Gen. Stats. (1873), p. 1001; *Tennessee*, Gen. Stats. (1871), §§ 1804, 1806; *Texas*, Pasch. Dig., vol. 1, § 5087 (on contracts and conveyances "respecting real or personal property").

[2] See notes to Rees v. Berrington, 2 Eq. Lead. Cas. 1867, 1896 (4th Am. ed.); Hurlbut v. Phelps, 30 Conn. 42; Headley v. Goundry, 41 Barb. 279; Clark v. Partridge, 2 Pa. St. 13; 4 Pa. St. 166; Keisselbrach v. Livingston, 4 Johns. Ch. 114; Kidder v. Kidder, 33 Pa. St. 268.

§ 72. 3. **Penalties.**— Another most important class of changes in the law consists in the adoption, to a considerable extent, of the equitable doctrines concerning penalties and forfeitures. The ancient common law rigidly exacted all penalties and enforced all forfeitures if the act which should prevent them was not done at the very time and in the precise manner stipulated. Equity from the earliest period of its growth adopted the policy of relieving against penalties and forfeitures, by generally treating the time of performance as immaterial, and a substantial conformity to the stipulated manner of it as sufficient, and by giving to the creditor what was justly and equitably his due, and compelling him to forego the surplus which he had exacted, and which the law permitted him to retain. These equitable doctrines have to a great extent been transferred into the law of the American states. Law courts give judgment for the amount really due, and not for the penalty, and often accept a subsequent performance without exacting the forfeiture. The most familiar example is that of a bond with penalty, conditioned for the payment of a smaller sum which represents the real debt. The equitable doctrine restricting the recovery to the sum constituting the actual debt, with interest for the delay, has been everywhere accepted as a settled rule of the law. This modification of the common law has generally been extended so as to include all cases where a penalty or forfeiture has been agreed upon as security for the payment of a certain or ascertainable sum of money.

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[1] Examples of such statutes are, 3 N. Y. R. S., p. 691, §§ 106, 108 (5th ed.); Civil Code of Cal., § 3137.

(a) This paragraph of the text is cited in Reeves v. Morgan, 48 N. J. Eq. 415, 21 Atl. 1040.

§ 73. 4. **Mortgages.**— Intimately connected with the equitable doctrine relating to forfeiture is the remarkable change which has been made in the law of the American states concerning mortgages of land. Without attempting to describe either the common law or the equity doctrine as to mortgages, it is sufficient for my present purpose to state very briefly their results. Under the common law and equity in combination, two different kinds of interests or estates, the legal and the equitable, are simultaneously held in the mortgaged premises by the two parties. The mortgagee is the legal owner, and after a default is entitled to the possession of the land; he can convey his estate, not by an assignment of the mortgage, but by a deed of the land itself; on his death it descends to his heirs or passes to his devisees, and does not go to his administrators or executors; in short, he is at law clothed with all the rights and powers of legal ownership.[1] On the other hand, the estate of the mortgagor, after default, is purely an equitable one, a right to redeem the land from the mortgagee, his heirs, devisees, or grantees, and therefore very properly denominated "an equity of redemption." Equity regards this interest of the mortgagor as the real beneficial estate in the land, subject, however, to the lien and encumbrance of the mortgage, and as such it can descend to his heirs, pass to his devisees, or be conveyed by deed to his grantees. According to the equitable theory, the interest of the mortgagee is simply a lien and encumbrance *on* the premises, and not an estate *in* the land itself. These legal rules, and this double ownership resulting therefrom, prevail in England, and are still retained in most of the New England states and in a few of the other commonwealths; but throughout the greater part of the country a radical change has been made in the law, and its doctrines as to the respective rights and interests of the mortgagor and mortgagee have been substantially conformed to those of equity. I shall take the law of New York as the type.

§ 74. In New York — and its legislation has been substantially followed in so many of the states that it may fairly be said to express the American doctrine — there is no longer any double ownership nor any equitable estate in the land; there is one legal estate only, and that belongs to the mortgagor until it is cut off by foreclosure and sale. The interest of the mortgagee, under ordinary circumstances, is not an estate of any kind *in* the land; he is simply a creditor holding a lien upon the mortgaged premises as security for his debt, which lien he must enforce by a foreclosure and sale.[a] He is not entitled to possession, and cannot maintain ejectment either against the mortgagor or a stranger. On his death his interest is wholly personal assets, and goes to his administrator or executor. He cannot convey the land, and his deed of it could operate (if at all) only as an assignment of the mortgage. He can assign the mortgage by mere delivery; but so completely is the debt the principal thing and the mortgage an incident, that an assignment of the debt carries with it the mortgage as a collateral, while an assignment of the mortgage without the debt is a nullity. On the other hand, the mortgagor is the owner of the entire legal estate, subject to the lien and encumbrance of the mortgage, until his title is divested by a foreclosure and sale; the term " equity of redemption," when used to designate his interest, is therefore a complete misnomer, productive only of confused and mistaken notions. As such owner, the mortgagor can convey, mortgage, or devise the land, and if he dies intestate, it descends to his heirs. These rules no longer form a part of the equitable doctrine merely; they are, partly as the results of statutes and partly of judicial decision, rules of the law, constantly recognized and enforced in all the courts of common-law jurisdiction.[1] The effect of these alterations in the law upon the equity jurisdiction has certainly been very great.

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[1] I have assumed in this description that the mortgage is in fee, which is the common case in the United States.

§ 75. 5. **Express Trusts.**— Another important change in the relations between law and equity has been effected by the statutes of many states concerning express trusts in land. By the English law, in the absence of any statutory restriction, express active trusts may be created for all possible purposes, and express passive trusts corresponding with all the various legal estates, in fee, for life, for years, in possession, and in remainder, as the case may be. In the latter class of trusts the naked legal title only is vested in the trustee, while the equitable interest of the beneficiary is the one which possesses all the attributes of real ownership. The field of equity jurisdiction which these trust estates presented has been greatly narrowed by the policy of American legislation. The statutes of New York and of many other states have at one blow abolished all express passive trusts, and have restricted express active trusts to a very few specified objects,[1] declaring void all those attempted to be created for other purposes. Even in the few cases where these trusts are permitted, the entire estate is vested in the trustee; the beneficiary has no ownership, legal or equitable, in the land; his sole interest is simply a right in equity to compel a performance by the trustee of the obligations created by the trust,— a right of action merely, and not an equitable estate of any kind in the subject-matter. This great alteration in the relations of the law and equity with respect to trusts in land has necessarily produced an important effect upon the extent and scope of the equity jurisdiction throughout a great part of the United States.

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[1] For example, every court of law will recognize and enforce an assignment of the debt and mortgage made by the mortgagee; and in every such court, as well as in courts having jurisdiction of probate matters, the interest of the mortgagee, upon his death, is recognized as devolving upon his personal representatives, while that of the mortgagor is treated as descending to his heirs or as passing to his devisees.

[a] The text is cited in Tapia v. Demartini, 77 Cal. 383, 11 Am. St. Rep. 288, 19 Pac. 641, to the point that a trust may be declared in a mortgage by parol, since it is not an estate in land.

§ 76. 6. **Recording and Priorities.**— The system of recording conveyances and mortgages of land which universally prevails throughout this country has greatly modified and simplified the doctrines of equity concerning notice which affect titles to real estates. While the fundamental principles with respect to notice are unchanged and form a part of our own equitable jurisprudence, it is not too much to say that most of the particular rules relating to titles which have been developed from these principles by the English Court of Chancery have little or no application in the United States.

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[1] The following are the objects for which express active trusts are generally permitted in the states which have adopted this legislation, namely: 1. To sell the land for the purpose of paying debts; 2. To sell, mortgage, or lease the land for the purpose of paying legacies or other charges upon it; 3. To hold and manage the land for the purpose of receiving its rents and profits and applying them to the use of a beneficiary; 4. To hold and manage the land for the purpose of receiving its rents and profits and accumulating them during the minorities of infant beneficiaries.

§ 77. 7. **Administration.**— Equity, in the exercise of its unrestricted powers, has jurisdiction in the matter of settling the personal estates of deceased persons; and in England this is undoubtedly the most important branch of the equitable jurisprudence,— a very large proportion of the suits brought in the Court of Chancery are administration suits. The jurisdiction may theoretically remain in some of the states which have conferred full equity powers upon their courts; it does not even nominally exist in the others; and it is *practically* unknown throughout the entire country. As administered in England, this head of jurisdiction includes everything pertaining to the settlement of decedents' estates, except the probate of wills, and the issue of letters testamentary and of administration;[a] and there is a considerable discrepancy between the legal and the equitable rules concerning the nature, distribution, and marshaling of assets. In the American states these matters are all governed by statutes, which determine the nature and regulate the application and distribution of assets by fixed and certain rules binding alike upon all tribunals. Probate courts are established for the settlement of decedents' estates, and all questions arising in the course of administration are decided by them, to the practical exclusion of the equity jurisdiction.[b] Equitable suits growing out of pending administrations are still frequent, but they are

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(a) The text is quoted in Moulton v. Smith, 16 R. I. 126, 27 Am. St. Rep. 728, 12 Atl. 891; cited, Toland v. Earl, 129 Cal. 148, 61 Pac. 914, 79 Am. St. Rep. 100.

(b) The text is cited in In re Cilley, 58 Fed. 977, 986 (proceeding to establish a will is not a "suit in equity").

brought for some special and partial relief, for the construction of a will, the determination of a controversy arising with respect to a particular legacy, the adjustment of conflicting claims to a particular fund, and the like. It is true that the statutory rules for the settlement of estates are largely based upon the principles which had been settled in equity, and that equitable doctrines are constantly enforced by the courts of probate; but it is no less true that this important head of equity jurisdiction has been greatly restricted, or even practically abandoned, in all the states.

§ 78. 8. **Infants.**— Another branch of the jurisdiction equally familiar to the English lawyer, and equally unknown in the United States, is that over *Infants.* Whenever an infant succeeds to property, the English chancery takes the management of his person and his estate. A proper suit having been commenced, the court appoints a guardian (in the absence of a testamentary appointment), and the infant is thenceforward a " ward of the court," under its actual paternal care. In some of the states, the courts possessing full equitable jurisdiction have *theoretically* the power to appoint a guardian; but even if this power should be exercised, the court does not make the infant its ward and extend a personal oversight over him. In this matter, however, as in the administration of decedents' estates, the legislature has intervened, and the probate courts practically appoint all guardians, and control their official actions. Under their general power in cases of trust and of accounting, the American courts of equity may give all proper relief to wards against their guardians; but the peculiar jurisdiction over the persons and estates of infants possessed by the English chancery does not, to any extent, exist in the American equity jurisprudence.[a]

§ 79. 9. **Married Women.**— One of the most important of the alterations made in the relations between law and equity is that caused by the legislation concerning married

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(a) The text is cited in Messner v. Giddings, 65 Tex. 301.

women's property and capacity to contract. The following outline will give a general notion of this legislation; its details must be postponed for a subsequent examination. In nearly all the states the common-law rules giving the husband an ownership or interest in his wife's property have been abrogated; the wife is clothed with a full legal estate in and right to all the property, real and personal, which she has at the time of the marriage, or which she may acquire by inheritance, by will, conveyance, grant, or gift, during its continuance; and she has generally the entire power of its management and disposition, as though she were unmarried. This is the prevailing type of statute, but in some of the states the husband must join in a deed or mortgage of her land, and in a very few he is still entitled to its possession. In addition to the foregoing, there are certain special forms of legislation prevailing over large portions of the country. A number of the western and southwestern states have substantially adopted the French system of "community of assets," whereby the two spouses are co-owners of the community property, which is under the husband's exclusive management during their joint lives. With reference to the wife's capacity of entering into contracts, there are two general types or classes of the legislation. By the first, which is confined to a comparatively few states, she is clothed with full power to contract in any business, trade, or profession which she carries on, and also with reference to her own property, and the latter embraces all agreements made for the benefit of her property, and all agreements made for any purpose which are expressly charged upon such property. All these contracts are legal in every sense of the term, and not equitable. When once made, they become personally binding upon her, and are enforced by ordinary legal actions, legal pecuniary judgments, and executions. By the second class, which prevails in most of the states, the wife's capacity is limited to agreements made with reference to her property; these contracts are wholly equitable in their nature and obligation, and can only be enforced by an equitable action against the property itself, and not against the wife personally.

§ 80. The effect of this legislation upon the equity jurisdiction in the United States must be very great. In the first place, the married woman's equitable separate estate, and the doctrines of equity directly concerned with its maintenance, are, for the future at least,[1] superseded. The fabric constructed by the chancellors with so much acumen and skill, in order to protect the natural rights of wives which the law ignored, is virtually overthrown. The law, by conferring full legal ownership upon married women, has done for them much more than family settlements or nuptial contracts can do, even when enforced by courts of equity. Equity in the United States is thus at one blow relieved of a subject-matter which in England occasions a very large part of its actual jurisdiction. With respect to the contracts of married women, the effect of the modern legislation has been directly the opposite in different states. In those commonwealths where wives have been clothed with the large capacity to contract, and their contracts have been made legal, the equitable jurisdiction over their agreements has been virtually abrogated. Whatever kind of contract is within the power of a married woman falls under the ordinary jurisdiction of the law courts, and a suit in equity to enforce it as a charge upon any specific property belonging to her would be useless, even if it could now be maintained. In all the other states where the wife's contracts are not yet made legal, the equitable jurisdiction is to a certain extent enlarged. It is no longer confined in its operation to her separate equitable estate held in trust for her by an express or implied trustee; it reaches to and operates upon *all* her property of which she holds the full legal title and interest. While the wife's power to make contracts which shall be a charge upon her property is not increased, the property thus affected, and which can be reached by a court of equity, is all which the wife holds in her own name and right by a legal title.

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[1] These statutes, of course, do not affect existing estates held in trust for wives; but in many of the states they authorize the wife, by means of an order of court, to convert such equitable interests into legal estates; that is, to compel a conveyance of the land directly to themselves by the trustees. Nor do these statutes forbid the creation of trusts in favor of married women in future, and such trusts are even now occasionally created; but all necessity for them, in order to protect wives against the acts or defaults of husbands, is removed, and the only advantage of such a trust is the protection of the land against the acts of the wives themselves, by so arranging the ownership that they can neither alienate nor encumber it.

§ 81. 10. **Statutory Limitations of Equity.**— The changes in the relations of law and equity described in the foregoing paragraphs are chiefly those resulting from alterations made in the law itself, by which it has assumed more of an equitable character; those to be hereafter described have resulted from modifications of equity jurisdiction or jurisprudence. In several of the states the full equitable jurisdiction exercised by the English chancery has never been conferred upon any tribunal. A partial jurisdiction only is possessed by some designated court, derived from and measured by statute, defined, limited, confined to certain enumerated classes of subject-matters. This fact, which is most important to members of the profession practicing in all parts of the country, should not be overlooked in a treatise upon equity as it is administered in the United States.

§ 82. 11. **The Auxiliary Jurisdiction.**[a]—A distinct department of equity jurisdiction which arose at an early day from the imperfection of the legal procedure was termed *Auxiliary*, since it was exercised, not to obtain any equitable remedy, nor to establish any equitable right or estate, but to aid in maintaining a legal right, and in prosecuting actions pending or to be brought in a court of law. This ancillary function of chancery was the necessary result of certain inflexible legal rules — especially those concerning the examination of witnesses and the obtaining of

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(a) Sections 82 and 83 are cited in Chapman v. Lee, 45 Ohio St. 356, 13 N. E. 736.

evidence — which interfered with the administration of justice in the common-law courts. The most important and common instances of this auxiliary jurisdiction were "Suits for Discovery" and "Suits for Perpetuations of Testimony," or for taking testimony "*de bene esse.*" A brief description of these proceedings — once so essential for the attainment of justice — will suffice for my present purpose. An action at law affecting property rights is pending between A and B. Either one of the parties,— I will assume it to be the defendant, B,— fearing that he cannot succeed without the help of facts within the personal knowledge of his adversary, commences a suit in equity against A, setting forth in his bill all the facts of the case, and adding thereto such interrogatories as he thinks will elicit the truth from A. A is thereupon obliged to answer this bill under oath, fully, and without reservation or evasion. No further relief is asked by the plaintiff, no decree is made, and as soon as the answer is complete, the function of the equity court is ended. Having thus obtained the written statements of his adversary under oath, B can, if he please, use them as evidence on the trial of the action at law; and under certain circumstances the same privilege may be enjoyed by A to use his answer as evidence in his own behalf. Such was the nature and office of the "Bill of Discovery"; and for a long time it was the only means of obtaining the evidence of the parties for use on the trial of legal actions. The "Suits to Perpetuate Testimony" or to take testimony *de bene esse* were special modifications of this contrivance. Where a dispute with respect to property rights existed between A and B, and in the one case no action had yet been brought, and could not yet be brought, while in the other case an action had already been commenced, and important evidence is within the knowledge of persons who, from age, sickness, or other sufficient cause, may not be able to testify upon the expected trial, either of the contestants may bring a suit in equity against the other, not for the purpose of trying and deciding the matters in controversy, but for the purpose merely of eliciting the facts through the answer and of taking the testimony of the witnesses. The answer and depositions, being preserved in the offices of the chancery, can then be used upon the trial of the legal action, whenever it shall take place. In other words, a court of equity entertained jurisdiction of the matter to the extent of taking the evidence and putting it into a permanent form, so that it might be "perpetuated" for future use in a court of law.[1]

§ 83. These instances of auxiliary jurisdiction have wholly disappeared from the English system under the late reorganization of the courts and the procedure,[1] and have almost entirely disappeared from the equity as administered in the United States.[2] In England, in the states of this country generally, and in the United States courts, parties are permitted to testify in their own behalf, and are required to testify in behalf of their adversaries, in all actions and proceedings of a civil nature, so that every ground or reason for a "bill of discovery" has been removed, by the far more efficient means of an oral and personal examination conducted by counsel in open court. In the states which have adopted the reformed American procedure, suits for mere discovery have been expressly abolished, since the defendant in all actions, with certain exceptions, can be compelled to answer under oath and to testify as a witness. In other states which keep up the

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§ 82, [1] See *post*, §§ 238–242, where these proceedings are more fully described.

§ 83, [1] See Judicature Act, Rules of Procedure, 25–27.

[2] It should be carefully observed that this proposition is confined to "bills of discovery," properly so called, as described in the text. The term "discovery" is often applied, but very improperly applied, to the statements and admissions made by the defendant in his answer, which may be useful to the plaintiff as evidence in the same suit in which the answer is filed. There is nothing in either the English or the American procedure which prevents the plaintiff in any action from taking advantage of all such admissions and disclosures of fact which the defendant in that action may make by his answer; on the contrary, such disclosures in the pleadings are favored and sometimes required. But this is not "discovery," technically and properly so called.

two jurisdictions of law and equity administered by the same tribunal, discovery as an auxiliary to trials at law is no longer necessary; and is, I believe, practically obsolete even where not formally abrogated.[3] [a] In the few states which still retain a separate Court of Chancery, this jurisdiction may be nominally preserved. The jurisdiction to perpetuate testimony has generally been supplanted by simple, inexpensive, and more summary and efficient methods prescribed by statute, which can be applied to all actions for the purpose of obtaining and preserving any species of evidence. It seems to be still retained, however, upon the statute-books of several of the states.

§ 84. 12. **The Reformed Procedure.**— The most radical and extensive alteration in the relations between law and equity has been wrought by the Reformed American Procedure, which prevails in more than half the commonwealths of this country, and all the essential features of which are enacted by the recent English Judicature Act.[1] The grand underlying principle of this system consists in the abolition of all the forms of legal actions, the abolition of all distinctions between actions at law and suits in equity, and the establishment of one Civil Action for the enforcement of all remedial rights. In and by this one civil action, legal and equitable causes of action, legal and equitable defenses, and legal and equitable remedies may be united, and may be determined by the same judgment. It has been settled by numerous decisions, wherever this system exists, that the legislative changes, being confined to procedure, have not affected the substantial doctrines either of law or of equity,— those doctrines which define and declare the primary rights and duties of individuals, and the remedies or reliefs to which they may be entitled. This proposition must, however, be accepted and understood with its proper and necessary limitations. The legislation has done much more than alter the mere external forms and modes of procedure; it has necessarily affected to a certain extent the equity jurisdiction in the granting of its remedies, and has in some instances rendered the exercise of that jurisdiction unnecessary, by removing the ground and occasion for the remedies. In other words, the legislation has made it unnecessary, under certain circumstances, to bring a suit in equity and to obtain specific equitable relief. The most important of these results I shall point out in a very brief manner.[a]

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[3] In several of the states which have not adopted the reformed procedure, "bills of discovery" are expressly abolished.

[1] See *ante*, § 40, note.

(a) The text is cited to this effect in Chapman v. Lee, 45 Ohio St. 356, 13 N. E. 736; Turnbull v. Crick, 63 Minn. 91, 65 N. W. 135.

§ 85. In the first place, the permission to set up an equitable defense against a legal cause of action has in a great number of instances removed all occasion for bringing a suit in equity by which the equitable right of the defendant constituting his defense may be established and the prosecution of the legal action may be restrained. I take a simple example of a very large class of cases. A, the vendor in a contract for the sale of land, brings an action of ejectment against B, the vendee, who is in possession, and having the legal title, must of course recover at law. B was therefore obliged to file a bill in equity against A, and obtain thereby a decree of specific performance, and in the mean time an injunction restraining the further prosecution of the action at law. Having obtained a conveyance of the legal title under his decree, B would be in a position to defend the action of ejectment, or any subsequent one which might be brought against him. By the reformed procedure, when the vendor commences a legal action to recover possession of the land from the vendee, the latter need not resort to a second equitable suit, nor obtain an injunction. The whole controversy is determined in the one proceeding. B's equitable estate and right to a conveyance is not only

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(a) See *post*, § 354, and note.

a negative defense to A's legal cause of action, but entitles B in the same action to assume the position of an *actor*, and to obtain the full affirmative relief which he would formerly have obtained by his separate bill in equity,— a decree for a specific performance and a conveyance of the legal estate. Although no substantial doctrines of equity have been altered, still, the vendee is no longer compelled in such circumstances to sue in equity, nor to demand the ancillary remedy of an injunction.

§ 86. This familiar example may be generalized into the following universal proposition: Whenever, under the former procedure, one party, A, had a legal estate or right which entitled him to recover in an action at law brought against B; and where B, having no legal defense to this action, was still possessed of an equitable estate or right which entitled him to some particular affirmative equitable remedy,— as, for example, a specific performance, a reformation or correction, a cancellation, a rescission, etc., — which remedy when obtained would clothe him with the legal estate or right, and enable him thereby to defeat the plaintiff A's action at law; and where, under these circumstances, B would be obliged to go into a court of equity jurisdiction, and file a bill therein against A, and obtain a decree granting the desired equitable relief, and, as an incident thereto, procure an injunction restraining A's action at law,— in all such cases, the necessity, and even the propriety, of bringing the separate equity suit and enjoining the legal action are completely obviated, since B can set up all his equity by way of defense or counterclaim, recover a judgment for the affirmative relief which he seeks, and defeat the action brought against him by A, in that very action itself. It would not be correct to say that the equity jurisdiction has been abrogated in this class of cases, since the defendant B might possibly follow the former method, and bring a separate action instead of setting up his equitable rights as a defense and counterclaim; but this circuitous mode of proceeding is seldom adopted, and will ultimately, perhaps, be prohibited by the courts, so that this direct equity jurisdiction will doubtless, in time, become obsolete.[1] [a]

§ 87. One other equally important change produced by the reformed procedure should be mentioned. Under the system of separate jurisdiction, when a person possesses an equitable right or estate entitling him to some particular equitable remedy which, when obtained, would, in turn, confer upon him a *legal* right or estate in respect to the subject-matter, and enable him therewith to maintain an action at law, he is obliged (except in a few special cases) *first* to bring a suit in equity and procure a decree establishing his right and granting him the needed equitable remedy, which clothes him with the *legal* title or estate. Having thus acquired a *legal* basis for his demand, he must go into a court of law and enforce his newly perfected legal demand by means of a legal action. As familiar illustrations, if a person holds an equitable estate under a land contract, he must compel a specific performance in equity before he can recover possession of the land at law; if he holds the equitable estate under an implied trust, he must in general obtain a transfer of the legal title from the trustee before he can maintain ejectment for the possession; if the instrument under which he claims is infected with mistake, and his full rights under it depend upon a correction of the mistake, he must obtain the remedy of reformation or re-execution in equity, and may then enforce his perfected legal right by the proper action at law; if his estate in land is purely an equitable one because a deed voidable through fraud has conveyed the legal title to another person, the equitable remedy of cancellation or rescission must be granted before a legal action for the possession can be successful. Wherever the reformed procedure has been administered according to its plain intent, the necessity of this double judicial proceeding has been obviated; indeed, if the true spirit of the new procedure is accepted by the courts, such a separation of equitable and legal rights and remedies, and their prosecution in distinct actions, will not perhaps be allowed. The plaintiff brings one civil action in which he alleges all the facts showing himself entitled to both the equitable and the legal reliefs needed to complete his legal right, and asks and obtains a double judgment, granting, first, the proper equitable remedy, and secondly, the legal remedy, by which his juridical position with respect to the subject-matter is finally perfected;[1][a] or he may simply demand and recover a judgment conferring only the final legal remedy, the preliminary equitable relief being assumed as an essential prerequisite to the recovery, but not being in terms awarded by the court.[2]

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[1] The following cases illustrate the operation of equitable defenses: Dobson v. Pearce, 12 N. Y. 156, 62 Am. Dec. 152; Pitcher v. Hennesey, 48 N. Y. 415; Heermans v. Robertson, 64 N. Y. 332; Crary v. Goodman, 12 N. Y. 266, 268, 64 Am. Dec. 506; Hoppough v. Struble, 60 N. Y. 430; Bartlett v. Judd, 21 N. Y. 200, 203, 78 Am. Dec. 131; Cavalli v. Allen, 57 N. Y. 508, 514; Andrews v. Gillespie, 47 N. Y. 487, 490; McClane v. White, 5 Minn. 178; Richardson v. Bates, 8 Ohio St. 257, 264; Petty v. Malier, 15 B. Mon. 604; Harris v. Vinyard, 42 Mo. 568; Onson v. Cown, 22 Wis. 329; Talbot v. Singleton, 42 Cal. 390, 395, 396; Bruck v. Tucker, 42 Cal. 346, 352; Lombard v. Cowham, 34 Wis. 486, 492. There may still be cases in which the defendant in the action at law cannot obtain full relief by means of an equitable defense, and is obliged to bring a separate suit in equity, and to obtain his equitable remedy by an affirmative decree, and in the mean time an injunction restraining the action at law. See this question quite fully discussed by Folger, J., in Erie Railway Co. v. Ramsey, 45 N. Y. 637.

(a) The text is cited to the effect that fraud in obtaining a judgment is an equitable defense to such judgment, under the reformed procedure: Hogg v. Link, 90 Ind. 346, 350.

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[1] As illustrations, see Laub v. Buckmiller, 17 N. Y. 620, 626; Lattin v. McCarty, 41 N. Y. 107, 109; N. Y. Ice Co. v. N. W. Ins. Co., 23 N. Y. 357; Cone v. Niagara Ins. Co., 60 N. Y. 619; Turner v. Pierce, 34 Wis. 658, 665; Gray v. Dougherty, 25 Cal. 266; Henderson v. Dickey, 50 Mo. 161, 165; Guernsey v. Am. Ins. Co., 17 Minn. 104, 108. But see Supervisors v. Decker, 30 Wis. 624.

[2] See Bidwell v. Astor Ins. Co., 16 N. Y. 263, 267; Phillips v. Gorham, 17 N. Y. 270; Caswell v. West, 3 Thomp. & C. 383; McNeady v. Hyde, 47 Cal. 481, 483; Sternberger v. McGovern, 56 N. Y. 12, 21.

[a] The text is quoted and followed in Browder v. Phinney, 30 Wash. 74, 70 Pac. 264, for the facts of which see *post*, § 183, note.

It follows, as an incident of this union of rights and remedies in one action,' that all occasion for the ancillary or provisional equitable remedy of injunction to restrain the defendant from proceeding at law is often, and indeed generally, avoided in this class of cases.

§ 88. The results of this reform in the procedure might be described with much more detail; but I have already accomplished my purpose, which was to indicate some of the great changes made by judicial decisions and by acts of the legislatures in the relations formerly subsisting between law and equity, and in the body itself of equity jurisprudence. The foregoing sketch, mere outline as it is, also shows very plainly that a treatise which would accurately represent to the reader the equity jurisprudence of the United States must conform to modern facts, rather than follow ancient traditions. It must recognize the existing condition, both of the law and of equity, the limitations upon the chancery jurisdiction, the alterations made by American legislation, institutions, and social habits. Many doctrines and modes of applying the jurisdiction which were important at an earlier day, and are perhaps still prominent in England, have become practically obsolete in this country, while others have risen in consequence, and are constantly occupying the attention of the courts. It is my purpose to discuss and describe the equity jurisprudence as viewed in this light, and to present the system which is now administered by the state and national courts of the United States. It is true that the fundamental principles are the same as those which were developed through the past centuries by the English chancery; but the application of these principles, and the particular rules which have been deduced from them, have been shaped and determined by modern American national life, and have received the impress of the American national character.

SECTION IV.

THE CONSTITUENT PARTS OF EQUITY.

ANALYSIS.

§ 89.	Object of this section.
§§ 90, 91.	Rights are either "primary" or "remedial"; each described.
§ 92.	Divisions of "primary" rights, viz.: 1. Those concerned with personal *status;* 2. Those concerned with things.
§§ 93–95.	Two general classes of rights concerned with things, viz.: "real" and "personal"; each described.
§§ 96, 97.	What of these kinds of rights are embraced within equity; both "primary" and "remedial."
§§ 98–107.	I. Equitable primary rights, kinds and classes of.
§§ 108–116.	II. Equitable remedial rights, kinds and classes of.
§ 112.	General classes of equitable remedies.
§§ 113–116.	Mode of administering them.
§ 116.	How far legal and equitable modes can be combined.
§ 117.	Recapitulation.

§ 89. **Object of This Section.**— I have thus far described the historical origin of equity, and its general nature considered simply as a separate department of the national jurisprudence, and in its relations with the other department called the "law." It is necessary now to make a closer investigation into the internal elements and features of equity, and to determine its constituent parts,— the character of the rights and duties created by its doctrines and rules.

§ 90. **Classes of Rights.**— Laying out of view the rules which form the "public law" and the "criminal law," all the commands and rules which constitute the "private civil law" create two classes of rights and duties, the "primary" and the "remedial." The primary rights and duties form the body of the law; they include all the rights and obligations of property, of contract, and of personal *status;* they are the very end and object of all law. If mankind were so constituted that disobedience to legal rules was impossible, then the law would be entirely made up of the rules which create these primary rights and duties.

But since all these primary rights and duties may be violated, another branch of the law becomes necessary, which may enforce obedience by means of the " Remedies " which it provides. All possible remedies are either substitutes or equivalents given to the injured party in place of his original primary rights which have been broken, or they are the means by which he can maintain and protect his primary rights in their actual form and condition. Remedial rights are those which a person has to obtain some appropriate remedy when his primary rights have been violated by another. Remedial duties are those devolving upon the wrong-doer in such case to give the proper remedy prescribed by law.

§ 91. Primary and remedial rights and duties stand towards each other in the following relations: Every command or rule of the private civil law creates a primary right in one individual, and a primary duty corresponding thereto resting upon another person or number of persons. These rights and duties are, of course, innumerable in their variety, nature, and extent. If a person upon whom a primary duty rests towards another fails to perform that duty, and thereby violates the other's primary right, there at once arise the remedial right and duty. The one whose primary right has been violated immediately acquires a secondary right to obtain an appropriate remedy from the wrong-doer, while the wrong-doer himself becomes subjected to the secondary duty of giving or suffering such remedy.[1] It is the function and object of courts, both of law and of equity, to *directly* enforce these remedial rights and duties by conferring the remedies adapted to the injury, and thus to *indirectly* maintain and preserve inviolate the primary rights and duties of the litigant parties. It is plain from this analysis that the nature and extent of remedial rights and duties, and of the remedies themselves, must depend upon two distinct factors taken in combination, namely, the nature and extent of the primary rights which are violated, and the nature and extent of the wrongs in and by which the violation is effected. The same primary right may be broken by many kinds of wrong-doing; and the same wrongful act or default may invade many different rights. The wrongs which are breaches of primary rights may be either positive acts of commission or negative omissions; their variety, form, and nature are practically unlimited, and no classification of them is necessary for the purposes of this discussion.

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[1] See 2 Austin on Jurisprudence, pp. 450, 453; vol. 3, p. 162; Pomeroy on Specific Performance of Contracts, § 1; Pomeroy on Remedies and Remedial Rights, §§ 1, 2.

§ 92. **Primary Rights.**— A very general analysis and classification of Primary Rights and Duties will, however, be essential to an accurate notion of the constituent parts of equity. The rules and their resulting primary rights and duties which make up the private municipal law — omitting, as before stated, the public and the criminal law — fall by a natural line of separation into two grand divisions, namely: 1. Those directly and exclusively concerned with or relating to *Persons;* 2. All the remaining portions, which, in a broad sense, relate to or are concerned with *Things.* The first of these divisions, under a natural and logical system of arrangement, comprises only those rules the exclusive object of which is to define the *status* of persons; or in other words, those which determine the capacities and incapacities of persons to acquire and enjoy legal rights, and to be subject to legal duties.[1] In the United States, where nearly all distinctions of class have been abolished, and all persons *sui juris* stand upon an equality with respect to their capacity of enjoying civil rights, and of being subject to civil duties, this division contains but a very small part of the law, as compared with the corresponding department in the Roman law, or even in the existing law of many European countries. It also follows, as a necessary consequence of this principle of classification, that most of the matter which Blackstone, and after him Kent and other institutional writers, have treated as belonging to the so-called "Rights of Persons," has been misplaced. Such matter has no connection whatever with personal *status* or capacity, and if any scientific or consistent system of arrangement is pursued, it plainly belongs among those rules which relate to Things.[2]

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[1] See 2 Austin on Jurisprudence, pp. 10, 382, 386, note, 412; vol. 3, pp. 170–172.

§ 93. The primary rights embraced in the second grand division of the law — those concerned with or relating to Things — are naturally separated into two principal classes, namely, Rights *in rem,* or Real rights, and Rights *in personam,* or Personal rights. Rights *in rem,* or real rights, are those which, from their very nature, avail to their possessor against all mankind, and a correlative duty rests alike upon every person not to molest, interfere with, or violate the right. Rights *in personam,* or personal rights, are those which avail to their possessor against a specified, particular person, or body of persons only, and the correlative duty not to infringe upon or violate the right rests alone upon such specified person or body of persons.

§ 94. **Real Rights.**— The first of these classes, the rights *in rem,* embraces three distinct *genera,* which differ from each other in the subject-matter over which the rights extend, but not in the essential nature of the rights themselves. These three *genera* are: 1. Rights of property of every degree and kind over lands or chattels, things real or things personal; 2. The rights which every person has over and to his own life, body, limbs, and good name; 3. The rights which certain classes of persons, namely, husbands, parents, and masters, have over certain other persons standing in domestic relations with themselves, namely, wives, children, and servants and slaves. In all kinds and degrees of property the right plainly avails to its possessor over the subject-matter — the land or the chattel — against all mankind, and a corresponding duty rests upon every human being not to interfere with or molest him in the enjoyment of the property. The right which every person has over his own life, body, limbs, or good name is of the same general nature. It imposes an equal duty upon every one not to injure, or in any manner disturb or molest, the possessor of the right in the free use and enjoyment of his own life, body, limbs, or good name. The rights of the husband, parent, or master *over* the wife, child, or servant are in our law very meager and limited, but so far as they exist at all, they resemble the more complete rights of property, because they avail against all mankind, and impose an equal duty upon every human being. Thus the husband is, by virtue of this right, entitled to the society of his wife, and the father is entitled to the services of his infant children, while a duty rests upon every person not to violate these rights by enticing away, seducing, or injuring the wife or child. This latter group of rights must not be confounded with those which the husband and wife, parent and child, master and servant, *hold against each other,* and which resemble in their nature the rights arising from contract.

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[2] Simply as illustrations of this improper classification, and without attempting to enumerate all the cases, I mention the following: All the rules concerning the property and contracts of married women, and the contracts actually made by infants, have no proper place in the division which treats of the "Law as to Persons"; they form a part of the law concerning Things, in exactly the same manner, and for exactly the same reason, that the rules regulating the property and contracts of adult men or of single women belong to the law of things. The same is true of the rules defining rights which Blackstone calls "absolute rights of persons," but which are no more absolute than their rights of property, or rights growing out of contract. The rules defining the rights and duties existing between husband and wife, parent and child, guardian and ward, master and servant, also come within the law concerning things, as truly as do those which define the rights and duties existing between the parties to any and every contract. The subject of corporations, with all of its ramifications involving every department of the private Municipal Law, has not even the semblance of belonging to the division which comprises the "Law concerning Persons."

§ 95. **Personal Rights.**— The second class, rights *in personam,* personal rights (called by the Roman law "Obligations") includes two distinct *genera,* namely: 1. Rights arising from contract; and 2. Rights arising, not from contract, but from some existing relation between two specific persons or groups of persons, which is generally created by the law. In every case of contract the right is held by one of the contracting parties and avails to him against the other party alone, while the corresponding duty rests only upon that other party, and not upon every human being. As contracts must of necessity be made between specified determinate persons, it follows that the rights and duties arising from contract must always avail against and rest upon some particular, definite person or number of persons. The same is true of the rights and duties arising from special relations existing between particular persons, created, not by contract, but by the law. The legal effect of these special relations is so similar to that produced by contract, that the rights flowing from them were said by the Roman law to arise from *quasi* contract (*quasi ex contractu*). The important and ordinary examples of this genus are the rights and duties against each other subsisting between husband and wife, parent and child, guardian and ward, executors or administrators and legatees, distributees, or creditors, and in many cases between trustees and *cestuis que trustent.* This general classification embraces all primary rights and duties, both legal and equitable, which belong to the private civil law.

§ 96. **Equitable Rights.**— The foregoing analysis will aid us in forming a clear and accurate conception of the constituent elements which make up the equity jurisprudence. Comparing the two great divisions of the private municipal law, law and equity, are they antagonistic, or simply complementary to each other? or does one merely occupy a sphere which the other does not? Are the rules creating the primary rights and duties embraced in the law different from the same class of rules, rights, and duties embraced in equity? Or does the distinction lie solely in the remedial rights and remedies which arise from the violation of rules common to both, and in the judicial modes by which these remedies are obtained? Equity does certainly deal largely in remedies and rights to them, and the opinion has been maintained by some modern writers, that it consists in nothing else; that all the rights peculiar to it and which it confers are remedial rights,— rights to obtain certain forms of remedy unknown to the law. That this opinion is a mistaken one is clearly demonstrated by an examination of the doctrines and rules of equity as now established, and the results which they have produced.

§ 97. Equity, as a branch of the national jurisprudence, and so far as it differs from the law, consists in fact of two parts, two different kinds of rules and rights. *First,* it contains a mass of rules which create primary rights and duties,—entirely irrespective of the remedies,— which are different from the corresponding rules, rights, and duties, with respect to the same subject-matter, contained in and enforced by the law. *Secondly,* it contains another mass of rules defining and conferring a variety of special remedies and remedial rights, both of which are to a very great extent unknown to the law. These remedies and rights to them are peculiarly "equitable," in contradistinction to those of the law, and irrespective of any difference in the primary rights for the violation of which they are granted. There may be four kinds of cases arising in the administration of the equity jurisdiction: 1. The primary right of the complaining party which has been broken may be purely legal,— that is, a right which the rules of law confer,— while his remedial right and the remedy which he obtains may be entirely equitable, recognized, and given by equity alone.[1] 2. His primary right which has been violated may be one which the rules of equity alone create, while his remedial right and remedy may also be only known to equity.[2] 3. His primary right broken may be entirely equitable, but his remedial right and remedy may be legal, such as are recognized, enforced, and granted by the law.[3] 4. In some cases, few in number, his primary right may be legal, while his remedial right and remedy are also legal, such as are administered by courts of law.[4] The peculiar feature which distinguishes equity from the law does not therefore consist solely in the fact that it possesses remedies which the law does not admit, nor solely in the fact that it creates and confers primary rights and duties different from any which the law contains, but in both these facts combined. These two elements will be examined separately.

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[1] I give simple ilustrations of these four classes. Of the first class is a suit by one who holds the legal title to land,— his primary right, of course, being legal,— to restrain the commission of waste upon it, or of trespasses doing irreparable damage; also the suit by the owner in fee of land in possession, to declare his own title against other claimants not in possession, whether their claims be legal or equitable. This latter kind of remedy is given by statute in many states. It is very plain in these cases that the plaintiff's estate and right are wholly legal, and the remedies are clearly equitable. The instances of this class are very numerous.

§ 98. **I. Equitable Primary Rights.**— Equity consists in part of rules creating primary rights and duties differing from those relating to the same subject-matter, which are purely legal. Recurring to the classification given in a former paragraph (§ 92), it will enable us to fix the limits of these primary rights, and to determine the classes in which they are all found, with great ease and precision. No equity primary rights belong to the first grand division of rights relating to or concerned with the *status* of persons. All the rules which define the capacities and incapacities of persons to acquire rights or to be subject to duties are strictly legal. The only apparent exceptions to this proposition are the statutory special proceedings for determining whether a person is a lunatic, or *non compos mentis*, or a confirmed drunkard, and the statutory suits for divorce, which in many of the states are confided to the Chancellor, or to a judge or court possessing equity powers. But in the first place, these proceedings are wholly statutory, and do not belong to the equity jurisdiction as such; and in the second place, they are wholly remedial.[1] All the primary rights, therefore, which form a part of equity are referable to the second division of Rights relating to Things.

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[2] As simple illustrations: A suit by the vendee in a parol contract for the sale of land part performed, to obtain a specific performance. The right and estate under the contract are recognized by equity alone, and the remedy is purely equitable. Also a suit brought by a mortgagor of land who has made default, to redeem. According to the original legal and equitable doctrines, the estate of such mortgagor is purely equitable. According to the doctrine prevailing generally in this country, the estate of the mortgagor is legal, and the case would fall within the first class. Suits by which a plaintiff's equitable title is turned into a legal estate, by the remedy of reformation, cancellation, and the like, also belong to this second class.

[3] In this class are some suits for accounting, the plaintiff's claim or interest in the fund or other subject-matter being equitable, and the accounting and pecuniary recovery being a legal remedy; also many suits in which the plaintiff's interest is equitable, and he recovers damages; also suits, by an equitable assignee of a fund in the hands of a third person, to recover the amount thereof, where the plaintiff's ownership is wholly equitable, but his relief is simply a recovery of a certain sum of money.

[4] The suits of this class are generally, if not always, actions for accounting, in which the rights and interests in the subject-matter are purely legal, and the action is brought in equity merely for convenience. The accounting and recovery of money are of course a legal remedy. The case of an ordinary suit to settle accounts among partners, where neither of them is insolvent, and no equitable liens or claims to marshal the assets arise, is a familiar example.

§ 99. From this division, also, there must be a process of elimination. In the department of Real rights, Rights *in rem*, very important and broad limitations are to be made. No equitable primary rights are contained in the second of the three *genera* into which real rights are divided,— or those which a person possesses over his own life, body, limbs, or good name. All the rights of this kind are purely legal; they are the very flower and fruit of the common law,— its highest excellence; and equity does not intrude upon this peculiar field of the law. Nor are any equitable primary rights contained in the third of these *genera*,— the rights held by certain classes of persons *over* certain other persons occupying special domestic relations towards themselves. The rules which define these rights, and determine the powers of husbands over their wives, parents over their children, guardians over their wards, masters over their servants, belong exclusively to the domain of the law; equity does not interfere with these purely personal relations. It is only when some property rights or questions concerning property arise between husband and wife, parent and child, guardian and ward, that equity can possibly have jurisdiction, and even in such cases the jurisdiction does not extend to the merely personal relations.[a]

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[1] These proceedings are in truth remedies; they are intended to ascertain and establish the *status* of lunacy, unsoundness of mind, etc., or to dissolve the *status* of marriage; but they do not determine the capacities or incapacities of lunatics, etc.,— all the rules which determine who are lunatics, insane, married, etc., and their capacities, are wholly legal, and not equitable.

§ 100. We are now prepared by this process of elimination to define with exactness the classes of primary rights and duties which alone come within the domain of equity, and thus form a part of its jurisprudence. Among the rights *in rem,* real rights, it is only those of the first genus, the rights of property, which do or can come within the scope of equity. Among the rights *in personam,* personal rights, both of the *genera,* those arising from contract and those arising from particular relations subsisting between two or more specific persons, may come within the domain of equity. The rights and duties of the parties growing out of contracts, and especially those growing out of certain determinate relations not based upon contract, but directly concerned with property, such as trustee and *cestui que trust* in all its forms, guardian and ward, executor or administrator and legatees, distributees, or creditors, and the like, constitute a large and important part of the primary rights falling under the equitable jurisdiction. Having thus referred the primary rights which equity creates to their general classes, I shall now describe with more of detail their essential nature and qualities.

§ 101. It must be premised that in most instances the legal primary right, and the corresponding but different equitable primary right, arise from the same facts, circumstances, acts, or events which are the occasion of both.

(a) The text is cited to this effect in Lombard v. Morse, 155 Mass. 136, 29 N. E. 205, 14 L. R. A. 273.

But in some instances, facts, circumstances, or events which are not the occasion of any legal right at all give rise to a primary right in equity.[1] With respect to the equitable primary rights taken as a whole, it is proper to say that most of them are simply *different* from or *additional* to those which exist at law; they do not contradict any rules upon the same subject-matter which the common law provides; but they are supplementary, touching upon particulars in relation to which the law is silent. Between this class of equitable rights and the corresponding legal rights there is, therefore, no conflict; each is absolutely true at all times and in all places; equity courts recognize and administer the one, and law courts the other, without clashing or discord. With respect to another portion of these primary equitable rules and rights, it must be said that they are not merely additional to, but they are in actual conflict with, the legal rules and rights concerning the same subject-matter, or arising from the same circumstances; between the kind of equitable rules and rights and the corresponding portions of the law, there is, therefore, an antagonism; the equity courts admit and uphold a particular right as resulting from a certain state of facts, which the law courts not only refuse to recognize, but which they would deny and oppose. This contrariety existed to a much larger extent in the infancy of the system than it does now; it has gradually become less as the law itself has grown more liberal and equitable. That there should be any such conflict between two departments of a municipal law is undoubtedly a blemish upon the national jurisprudence; but this condition had a strictly historical origin, and the very progress towards perfection largely consists in the elimination of these instances of antagonism. It should be remembered, also, that equity sometimes furnishes its remedies for the violation of primary rights which are strictly legal, as, for example, in many cases of accounting.

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[1] A familiar example will illustrate both of these cases. From the same fact, namely, a valid written contract for the sale of land, there arise the legal right of the vendee, and also his very different equitable right. From a verbal contract for the sale of land when part performed, there arises no legal right whatever; but these facts, the verbal contract together with the part performance, are the occasion of an equitable right in the vendee which is even a right of property, an equitable estate in the land itself.

§ 102. A few examples will serve to illustrate the foregoing description of equitable rules and rights, and will exhibit its correctness in the clearest manner. Although the first of the cases selected no longer exists, it is none the less appropriate for the purpose of showing the exact nature of equitable doctrines in their relations with the law. As has already been mentioned, at an early day the law declared that when a debtor on a sealed obligation had paid the debt, but had failed to take an acquittance under seal, or a surrender of the instrument, he was still liable, and the creditor could recover the amount a second time by action. Equity interfered and gave the debtor the remedy of a perpetual injunction against any action at law, and perhaps the delivery up or cancellation of the bond. It is not the *form of the remedy* to which I now call attention, but the *primary equitable right* for the maintenance of which the remedy was given. Compare the rights and duties of the two parties at law and in equity. The law said that notwithstanding the payment already made, the primary right of the creditor arising from the contract to demand the money, and the primary duty of the debtor to pay it, still existed in full force, and it therefore gave the remedial right of an action to collect the debt. Equity said the exact opposite of this. It declared that the primary right of the creditor and the primary duty of the debtor had been ended; that the obligation of the debtor to pay had been destroyed, and in its place there had arisen a right to have the evidence of that obligation canceled or to have evidence of the payment created in a formal manner. It therefore gave to the debtor the remedial right and the remedy of an injunction and of a cancellation. It is an entirely mistaken and even absurd explanation of this and other analogous cases, to assert that equity simply granted a remedy which the law did not give. Remedies are not conferred by equity courts, any more than by law courts, unless a primary right and duty exist, which have been violated, so that a remedial right arises from such violation. Equity did not, in this case, interpose its remedy in favor of the debtor for the violation of any *legal* right; for the law most peremptorily affirmed that the primary right of the creditor, which it gave him on the occasion of the sealed contract being executed, was in full force, and that the primary duty which it imposed upon the debtor remained unaffected. Equity as emphatically denied all this, and asserted that no such primary right and duty were left existing, but that the position of the two parties had been exactly reversed. There was a plain and direct conflict in the primary rights and duties flowing from the same facts and events. It is true, this particular instance of antagonism no longer exists, since the absurd rule of the law has long been changed, so as to harmonize with the equitable doctrine; but I have thus dwelt upon the case at large, because it is a most admirable illustration of the *class* of equitable primary rights which are in conflict with, and not merely supplementary to, the legal primary rights resulting from the same circumstances.

§ 103. I give another example of the same class. Under the prohibition of the Statute of Frauds, a contract for the sale of land, when not in writing, cannot be enforced in law, even though part performed. It makes no difference whether the statute says, as in England and in some of the states, that no action can be maintained on such an agreement, or says, as in the other states, that the agreement is void; the result is practically the same in either form of the statute: the verbal contract is no contract at law, but is simply a nullity.[1] Equity speaks a very different language.

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[1] I am, of course, aware of the theory so often stated by courts, that the statute only affects the evidence, and not the right. But a right which cannot under any possible circumstances be enforced is certainly *no* right. This purely technical doctrine in relation to the statute was *invented* in

It says that such a verbal contract, if part performed in a proper manner, shall be enforced. The processes of reasoning through which courts of equity have reached this conclusion, and the theory which they have adopted to reconcile their judicial action with the prohibitions of the statute, are wholly immaterial; the result is patent upon any theory, that equity from certain acts and events creates primary rights and duties in the parties diametrically opposed in their nature to those which the law creates on the occasion of the same facts. The law declares that from the verbal contract, although part performed, no primary right arises in favor of either party, and no corresponding duty devolves upon either; and if either refuses to do what he has thus verbally promised, the law admits no remedial right in the other, and gives him no remedy. Very different is the result in equity. Whatever be the grounds of its action, the plain fact is, that when such a verbal agreement has been properly part performed, say by the purchaser, equity recognizes in him exactly the same primary right which would have existed if the contract had been written, — the right to have the very thing done which was agreed to be done,— and devolves upon the vendor exactly the same duty which would then have rested upon him; and if this primary right or duty is violated by the vendor's refusal to perform, equity gives to the vendee its remedy of a specific enforcement. The same is true when the part performance has been by the vendor. In this instance, also, the primary rights and duties created by equity are not only additional to, but in direct conflict with, those created by the law between the same parties under the same circumstances. In both the foregoing examples the equitable rights and

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order to admit a legal basis for certain collateral results flowing from a verbal contract; it has never been carried to the extent of maintaining that any *legal right* arose from such an agreement. It is strictly correct, therefore, to say that with either form of the statute no *legal* primary right results from a verbal contract within the statute; for if there were any such right, its violation would give rise to a legal remedy, which is impossible.

duties belong to the class of "Personal,"— Rights *in personam,* being against a specific or determined person.

§ 104. Another remarkable example of equitable primary rights, in direct conflict with those created by the law under the same facts, is shown in those contracts of married women which are treated as valid and enforced by equity. At the common law every agreement of a married woman was simply a nullity, not merely voidable, but absolutely void. Equity did not in a direct manner abolish this legal dogma. It did, however, in the cases reached by its doctrine, create a primary right and duty from the contract, which, being violated, it enforced in its own manner and by its own peculiar remedy; it even enforced an agreement between the husband and wife, if beneficial to her rights of property. So far as equity went, there was thus a direct antagonism between its rules and those of the law. The law said most peremptorily that no right or duty arose from the transaction. Equity said that the contract was the occasion of a full right and duty of performance, and although in deference to the common law it did not enforce the duty against the wife personally, it enforced it against her separate estate, upon which it was a charge. And in agreements made by the married woman for the benefit of her separate estate, equity gave her its remedy of specific performance.[1]

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[1] I add one more striking illustration. When there are two or more *joint* promisors and debtors,— A, B, and C,— and one of them, C, dies, then at the common law all his liability ceases absolutely. The creditor can maintain no action at law, under any circumstances, against his personal representatives to recover the debt or any portion thereof; the creditor's sole primary right growing out of the original contract, and his sole remedy by action, are against the survivors, A and B. Equity, however, has altered these relations. Equity regards the original demand of the creditor as still subsisting against the estate of the deceased joint debtor, C, and such estate as still remaining bound by the obligation; and therefore enables the creditor to maintain a suit against the representatives of C, for the purpose of recovering the amount due. Here the antagonism is plain and direct; and it makes no difference whether we adopt the English rule that the creditor may sue the representatives of the deceased at his election, or the rule prevailing in some of our states, that the creditor can only sue C's representatives, when

§ 105. I pass to examples of other kinds. Wherever the books or the courts speak of "equitable estates," either in land or in chattels, as held by a person, there are in reality equitable *real* rights, rights *in rem,* rights of property, in the land or chattels, different from or additional to the rights arising from the same facts which the law confers upon the same party. The kinds and degrees of these equitable rights of property are numerous, ranging from the most complete, beneficial ownership, simply wanting the legal title, through various grades to mere liens; the special rules concerning them constitute an important part of equity jurisprudence. I shall mention a few examples for purposes of illustration. The most familiar case in this country is that of the ordinary executory contract for the sale of land. The law recognizes from this transaction nothing but "personal" rights and duties. As long as the agreement remains executory, the vendee acquires no right of property in the land, nor the vendor in the purchase-money; each party has the right against the other that the contract shall be fulfilled according to its terms; but for the violation of this primary right the only legal remedy is a pecuniary compensation. The view which equity takes of the juridical relations resulting from the transaction is widely different. Applying one of its fruitful principles, that what ought to be done is regarded as done, equity says that from the contract, even while yet executory, the vendee acquires a "real" right, a right of property in the land, which though lacking a legal *title,* and therefore equitable only, is none the less the real, beneficial

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he is unable to enforce his demand against the survivors. In either form of the rule, equity regards the primary right of the creditor growing out of the original contract, and the obligation of the deceased debtor, *as still existing,* and therefore gives its remedy by suit; while the law regards such right and obligation as wholly gone, and therefore refuses any remedy. It is true that the legislature, in some states, has abrogated this legal doctrine, and has made the estate of the deceased joint debtor liable at law. Similar remarks might be made concerning the case of two or more *joint* creditors, where one of them dies, and the contrasting doctrines of law and of equity applicable thereto.

ownership, subject, however, to a lien of the vendor as security for the purchase-price as long as that remains unpaid. This property in the land, upon the death of the vendee, descends to his heirs, or passes to his devisees, and is liable to the dower of his widow.[a] The vendor still holds the legal title, but only as a trustee, and he in turn acquires an equitable ownership of the purchase-money; his property, as viewed by equity, is no longer real estate, in the land, but personal estate, in the price, and if he dies before payment, it goes to his administrators, and not to his heirs. In short, equity regards the two contracting parties as having changed positions, and the original estate of each as having been "converted," that of the vendee from personal into real property, and that of the vendor from real into personal property.[b] Although these primary rights which equity thus creates are very different from those which the law recognizes, there is still no conflict or antagonism between the two.[c] While equity gives to the purchaser a property in the land, and furnishes him with its specific remedies to maintain and enforce that ownership, at the same time it does not deny nor interfere with his legal primary right against the vendor personally arising from the contract. The vendee in fact has an election. Relying upon the mere *personal* primary right of contract, he or his executors or administrators may sue in a court of law to recover damages for a violation of the agreement; or relying upon the *real* right, his ownership of the land, he or his heirs may sue in a court of equity, and procure his ownership to be fully established, and the legal muniments of his title perfected.

(a) The text is quoted in Parks v. Smoot's Admrs., 105 Ky. 63, 48 S. W. 146; Walker v. Goldsmith, 14 Oreg. 125, 12 Pac. 537.

(b) The text is quoted in Parks v. Smoot's Admrs., 105 Ky. 63, 48 S. W. 146; Clapp v. Tower, 11 N. D. 556, 93 N. W. 862; cited, Schenck v. Wicks, 23 Utah, 576, 65 Pac. 732.

(c) See, further, as to the equitable estates arising from the executory contract for the sale of land, *post*, §§ 367, 368, 372, 1160, 1161, 1260, 1261, 1263, 1406.

§ 106. In all cases of implied trusts there is the same difference between the legal primary right, purely "personal" in its nature, and the equitable estate, or right of property. One instance will illustrate the entire class. A receives from B a sum of money under an agreement to purchase therewith a parcel of land for B, and to take the conveyance in the latter's name; he purchases the land, but takes the deed to himself in violation of his duty, and with the design of obtaining all the benefit and of retaining the ownership. The law under these and all similar circumstances sees only a contract, express or implied, between the parties, with the purely "personal" rights which spring from contract. B has no property in the land, and his only legal remedy is compensation by damages. In equity, however, B acquires a "real" right, an estate in the land, which is regarded as the true and beneficial ownership, with all the incidents of real property; and he can establish that ownership by compelling A to convey the legal title and deliver the possession.

§ 107. The same and sometimes even a greater difference between the legal and equitable rights exists in all instances, so common in England, but no longer permitted in many American states, but seldom known, even if theoretically possible, in the others, of express passive trusts in lands. At law the *cestui que trust* never acquires any property in the land so long as the trust is subsisting, and in many cases he obtains no right whatever, either of property or of contract. In equity, however, the *cestui que trust* is the real owner; his primary right is one of property in the land, either in fee, for life, or for years. Another exceedingly instructive example is the estate of the mortgagor created by equity, while the law, unless altered by statute, regards all the property as vested in the mortgagee. I need not add any more examples. I have already given a sufficient number and variety to illustrate and show the truth of my main proposition,— that equity is not wholly a system of remedies; but that it consists in part of primary rights and duties, and of the rules concerning them, differing from, sometimes conflicting with, but more often additional to, the primary rights, duties, and rules relating to the same matters established by the law.

§ 108. II. **Equitable Remedies.**— Equity consists, to a very great extent, of Remedies and Remedial Rights different from any which the law administers by means of its ordinary actions;[1] although it does, under certain circumstances, grant remedies which are legal in their nature, and are capable of being conferred by a judgment at law, namely, a mere recovery of money, or of the possession of specific land or chattels. Many of the ordinary equitable remedies are derived directly from the nature of the primary right which they are intended to protect. For example, in the case of a contract for the purchase of land, or of an implied trust in land, or of any other transaction from which the equitable primary right consists in a right of property, this equitable estate, although the real, beneficial ownership is subject to some great inconveniences which lessen its value, the holder of the legal title in trust for the equitable owner cannot defeat the latter's right as long as he retains such title in his own hands, but he can convey it to another *bona fide* purchaser, and thus cut off the existing equitable estate. To prevent this, and to secure his full enjoyment of the property, a peculiar remedy is given to the equitable owner, by which he establishes his right, perfects his interest, compels a conveyance of the legal title, and a transfer of the possession, if necessary, and thus acquires a full and indefeasible estate, legal as well as equitable, in the land.[a] A large class of remedies are thus based upon and exactly fitted to the nature of the primary right; these remedies are distinctively equitable; and their intimate correspondence with the primary rights which they enforce has, more than anything else perhaps, led to the mistake, alluded to in a former paragraph, of confounding all equitable *primary* rights with *remedial* ones, and of supposing that equity is wholly a system of remedies.

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[1] I intentionally pass by the specific legal remedies which the law gives by means of Mandamus, Quo Warranto, and certain other special proceedings, and which have some general resemblance to the reliefs granted by equity.

The *principle* of equitable primary rights, as distinguished from legal primary rights, and of equitable remedies, was very clearly recognized and illustrated by the doctrine concerning the liability of a married woman's separate estate to be appropriated in equity in satisfaction of her contracts, by the English Court of Appeal in the very recent case of Ex parte Jones, L. R. 12 Ch. Div. 484, 488–490. Speaking of the nature and grounds of this equitable liability, James, L. J., said: "If she is not liable to be sued as a *feme sole* in what used formerly to be called a common-law action, she is not liable to be sued for a debt at all. In equity the liability was to have her separate estate taken from her for the benefit of the person with whom she had contracted on the faith of it. That was a special *equitable remedy*, arising out of a special *equitable right*. But the married woman who contracts in that way is not a *debtor* in any sense of the word" (that is, she is not liable under a contract binding at law, which creates the legal liability of indebtedness and the corresponding legal right of a creditor). Brett, L. J., said: The equitable procedure "did not enable any one to sue a married woman as upon and for a debt in a court of equity. It was a peculiar remedy against the separate property of the married woman so long as it existed, but it was not a remedy against her as and for a debt."

Cotton, L. J., said: "A debtor must be a person who can be sued personally for a debt, and who is liable to all the consequences of a personal judgment against him. But that is not at all the position of a married woman, even though she has separate estate. . . . It is not the woman, as a woman, who becomes a debtor, but her engagement has made that particular part of her property which is settled to her separate use a debtor and liable to satisfy the engagement."

§ 109. The distinguishing characteristics of legal remedies are their uniformity, their unchangeableness or fixedness, their lack of adaptation to circumstances, and the technical rules which govern their use. The legal remedies by action are, in fact, only two: recovery of possession of specific things, land or chattels, and the recovery of a sum of money. When a person is owner of land or of chattels in such a way that he is entitled to immediate possession, he may recover that possession; but since the action of "Ejectment" has taken the place of the old real actions, a recovery of the land by its means does not necessarily determine or adjudge the *title,* and in a recovery of chattels by the action of replevin, the title is only determined in an incidental manner.[1] For all other violations of all possible primary rights, the law gives, as the only remedy, the recovery of money, which may be either an ascertained sum owed as a debt, or a sum by way of compensation, termed damages. Equitable remedies, on the other hand, are distinguished by their flexibility, their unlimited variety, their adaptability to circumstances, and the natural rules which govern their use. There is in fact no limit to their variety and application; the court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all the parties.[a]

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[a] This paragraph of the text is cited in Provisional Municipality of Pensacola v. Lehman, 57 Fed. 324, 330, 13 U. S. App. 411 (suit for specific performance against a municipality).

§ 110. Notwithstanding this unlimited power of expansion and invention, there are certain species of equitable remedies which have become well established and familiarly known, and which are commonly designated by the term "equitable remedies" whenever it is used. They may be separated into three classes: 1. Those which are entirely different from any kind of reliefs known and granted by the law. Of this class are the preventive remedy of Injunction, the restorative remedy of Mandatory Injunction, the remedies of Reformation, Specific Performance, and many others.[a] 2. Those which the legal procedure recognizes, but does not *directly* confer, and the beneficial results of which it obtains in an indirect manner. A familiar example is the relief of Rescission or Cancellation. A court of equity entertains a suit for the express purpose of procuring a contract or conveyance to be canceled, and renders a decree conferring in terms that exact relief. A court of law entertains an action for the recovery of the possession of chattels, or, under some circumstances, for the recovery of land, or for the recovery of damages, and although nothing is said concerning it, either in the pleadings or in the judgment, a contract or a conveyance, as the case may be, is virtually rescinded; the recovery is based upon the fact of such rescission, and could not have been granted unless the rescission had taken place. Here the remedy of cancellation is not expressly asked for, nor granted by the court of law, but all its effects are indirectly obtained in the legal action.[1] [b] It is true, the equitable remedy is much broader in its scope, and more complete in its relief; for its effects are not confined to the particular action, but by removing the obnoxious instrument they extend to all future claims and actions based upon it. 3. Those which are substantially the same both in equity and at the law. Familiar examples of this class are the partition of land among co-owners, and the admeasurement of dower, in which the final relief granted by equity is the same as that obtained through the now almost obsolete legal actions;[2] the process of accounting and determining the balance in favor of one or the other party;[c] and even, under special circumstances, the award of pecuniary damages expressly. This mode of classifying equitable remedies was both common and convenient while the jurisdictions of law and equity were wholly distinct and confided to different tribunals, but has lost much of its efficacy since they have been conferred upon the same court, and under the reformed procedure, which combines legal and equitable remedies in one action, it has become positively misleading.

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[1] It should be remembered that I am speaking of the common-law forms of action, and not of the system introduced by the reformed procedure. Since in the action of ejectment the plaintiff was a fictitious person, and not the real party in interest, a judgment was no bar to any number of succeeding actions; it required a suit in equity and a perpetual injunction to restrain the continuous bringing of such actions in a given case, and to *declare* the title. In the American states, statutes have put a limit upon the number of separate actions which may be brought. Under the reformed procedure, the action to recover land really has nothing in common with "ejectment"; it rather resembles the old "real action" in determining the *title* as well as the possession, and it is so regarded in some of the states. But by a strange inconsistency, the statutes of other states treat it as only a simplified ejectment, and the judgment recovered by it as not finally adjudicating upon the title. In a few of the states, the old common-law "real action" is still used instead of ejectment.

(a) The text is quoted in Sourwine v. Supreme Lodge, 12 Ind. App. 447 54 Am. St. Rep. 532, 40 N. E. 646.

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[1] It would perhaps be more correct to say that the legal judgment proceeded upon the assumption that one of the parties had himself rescinded the contract or conveyance prior to the suit, and that he was justified in so doing; but this explanation does not alter the result or modify the statement of the text. In either theory, the legal procedure *recognizes* the rescission *as a fact*, and its benefits are secured *indirectly* by the judgment; as in actions by defrauded vendors to recover the goods or their value.

(a) This paragraph of the text is cited in Provisional Municipality of Pensacola v. Lehman, 57 Fed. 324, 330, 13 U. S. App. 411, 6 C. C. A. 349 (suit for specific performance against a municipality).

(b) The text is quoted in State v. Snyder, 66 Tex. 687, 18 S. W. 106, 108.

§ 111. Abandoning, therefore, this method of arranging and describing remedies, as no longer adapted to the administration of equity jurisprudence at the present day, I shall classify them according to their essential natures. Equity has followed the true principle of contriving its remedies so that they shall correspond both to the primary right of the injured party, and to the wrong by which that right has been violated. It has, therefore, never placed any limits to the remedies which it can grant, either with respect to their substance, their form, or their extent; but has always preserved the elements of flexibility and expansiveness, so that new ones may be invented, or old ones modified, in order to meet the requirements of every case, and to satisfy the needs of a progressive social condition, in which new primary rights and duties are constantly arising, and new kinds of wrongs are constantly committed.[a]

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[2] The ancient legal actions of partition and admeasurement of dower, though long discarded in England, are still retained in a modified form in Massachusetts, Pennsylvania, and perhaps in two or three additional states. In other states, where the reformed procedure has not been introduced, "ejectment" is sometimes used for the same purpose.

(c) The text is cited in Russell v. McCall, 141 N. Y. 437, 38 Am. St. Rep. 807, 36 N. E. 498.

(a) The text is quoted in Union Pacific R. Co. v. Chicago, R. I. & P. R. Co., 163 U. S. 564, 16 Sup. Ct. 1173; Columbia Ave. Sav. Fund, etc., Co. v. City of Dawson, 130 Fed. 152, 176; Harrigan v. Gilchrist (Wis.), 99 N. W. 909; Sourwine v. Supreme Lodge, 12 Ind. App. 447, 54 Am. Rep. 532, 40 N. E. 646; and cited in Kessler & Co. v. Ensley Co., 129 Fed. 397.

§ 112. Although the number and variety of particular remedies are great, those in common use may be grouped into certain general classes according to their essential elements, which, as said above, are based upon the primary right violated and the wrongful act or default in combination. These classes are the following: 1. *Declarative Remedies,* or those whose main and direct object is to declare, confirm, and establish the right, title, property, or estate of the plaintiff, whether it be equitable or legal. The remedies of this class are often granted in combination with others, and in fact they sometimes need other kinds of relief as a preliminary step to make them effective; but on the other hand, they are often granted by themselves, unconnected with anything else. 2. *Restorative Remedies,* or those by which the plaintiff is restored to the full enjoyment of the right, property, or estate to which he is entitled, but which use and enjoyment have been hindered, interfered with, prevented, or withheld by the wrong-doer. The legal remedies of this kind are simple recoveries of possession either of land or of chattels. The equitable remedies of restoration are much more various in their form and complete in their effect. Like those of the first class, they are often granted in combination with other kinds of relief, and frequently need some other special equitable remedy, such as cancellation or reformation of instruments, to remove a legal obstacle to the full enjoyment of the plaintiff's right, and to render them efficient in restoring him to that enjoyment. 3. *Preventive Remedies,* or those by which a violation of a primary right is prevented before the threatened injury is done, or by which the further violation is prevented after the injury has been partially effected, so that some other relief for the wrong actually accomplished can be granted. The ordinary injunction, whether final or preliminary, is the familiar example of this class; the mandatory injunction is essentially a restorative remedy. 4. *Remedies of Specific Performance,* or those by which the party violating his primary duty is compelled to do the very acts which his duty and the plaintiff's primary right require from him. The remedies of this class are very numerous in their special forms and in respect to the juridical relations in which they are applicable. "Specific performance" is often spoken of as though it was confined to the case of executory contracts; but in reality it is constantly employed in the enforcement of rights and duties arising from relations between specific persons which do not result from contracts, as, for example, between *cestuis que trustent* and their trustees, wards and their guardians, legatees, distributees, or creditors and executors or administrators, and the like.[a] In these latter cases, however, as well as in that of the specific performance of an executory contract at the suit of a vendor, the form and nature of the final relief is often the same as that of accounting, pecuniary compensation, or restoration. 5. *Remedies of Reformation, Correction, or Re-execution,* by means of which a written instrument, contract, deed, or other muniment of title, which for some reason does not conform to the actual rights and duties of the parties thereto, is reformed, corrected, or re-executed. Sometimes this remedy is asked for and obtained simply on its own account, merely for purpose of correcting the instrument; but it is often, and perhaps generally, obtained as a necessary preliminary step to the granting of a further and more substantial relief needed by the plaintiff, such as a restoration to full rights of property, or the specific performance of the contract after it has been corrected. 6. *Remedies of Rescission or Cancellation,* or those by which an instrument, contract, deed, judgment, and even sometimes a legal relation itself subsisting between two parties, is, for some cause, set aside, avoided, rescinded, or annulled. This remedy, like the preceding, is sometimes conferred as the sole and final relief needed by the plaintiff, but is often the preliminary step to a more effective remedy by which his primary right is declared or restored. 7. *Remedies of Pecuniary Compensation,* or those in which the relief consists in the award of a sum of money. These remedies, whose final object is the recovery of money, are of three distinct species, which differ considerably in their external form and incidents, but which agree in their substance,— in the intrinsic nature of the final relief. They are the following: *First.* Those in which the relief consists simply in the recovery of a general pecuniary judgment; that is, a judgment to be enforced or collected out of the debtor's property generally, — any property which he may own liable to be taken in satisfaction. This simple pecuniary recovery is, in the vast majority of cases, legal, and not equitable, but it is not unknown in equity.[b] A court of equity occasionally grants the relief of compensatory damages in connection with some other specific relief,[c] and under very peculiar circumstances it decrees the payment of damages alone. Several kinds of equitable suits are wholly pecuniary in their relief, as those for contribution and exoneration.[1] *Secondly.* Those cases in which the relief is not a *general* pecuniary judgment, but is a decree of money to be obtained and paid out of some particular fund or funds. The equitable remedies of this species are many in number and various in their external forms and incidents. They assume that the creditor has, either by operation of law, or from contract, or from some acts or omissions of the debtor, a lien, charge, or encumbrance upon some fund or funds belonging to the latter, either land, chattels, things in action, or even money; and the *form* of the remedy requires that this lien or charge should be established, and then enforced, and the amount due obtained by a sale total or partial of the fund, or by a sequestration of its rents, profits, and proceeds.[d] These preliminary steps may, on a casual view, be misleading as to the nature of the remedy, and may cause it to appear to be something more than compensatory; but a closer view shows that all these steps are merely auxiliary, and that the *real* remedy, the final object of the proceeding, is the pecuniary recovery. Among the familiar examples of this species are the suit to foreclose a mortgage of land, common throughout the United States, by a sale of the mortgaged premises;[2] the suit to foreclose a chattel mortgage by a sale of the goods; a suit to enforce a vendor's lien by a sale of the land; the creditor's suit to enforce his equitable lien upon the debtor's property by sale; the suit to enforce payment of a married woman's contract by a sale of the separate estate upon which it is charged; and generally, all similar suits the object of which is to enforce an equitable lien upon a fund, and thereby to obtain satisfaction of the demand which it secures. *Thirdly.* There is also another species of pecuniary remedies, closely analogous to the last, and differing from it only in the additional element of a distribution of the final pecuniary awards among two or more parties having claims either upon one common fund or upon several funds.[e] The final relief in all these cases is simply pecuniary; the amounts to which the different parties are entitled are ascertained, and are obtained by a distribution of the fund or funds upon which they are chargeable. Of this species are suits to wind up partnerships and distribute partnership assets; to settle and distribute the personal estates of decedents; to marshal assets; and the statutory proceeding to wind up the affairs of insolvent corporations. 8. *The Remedy of Accounting.* This is closely analogous to the remedy of Compensation, and is generally used in connection with and auxiliary to some forms of it. It is also a legal remedy, but has become to a great extent equitable. It is a necessary step in many forms and varieties of pecuniary relief, and sometimes is an essential preliminary in establishing rights of property in lands or chattels. 9. *Remedies of Conferring or Removing Official Functions.* Courts of equity are empowered by statute in many of the states to remove and to appoint trustees of private trusts, and under certain circumstances to remove and to appoint, or provide for the election of, the managing officers of private business corporations. 10. *Remedies of Establishing or Destroying Personal Status.* This species of remedies does not belong to the original jurisdiction of chancery, and so far as it exists, is wholly of statutory origin. I would include in it suits to obtain a divorce and to annul a marriage,[f] which in several of the states are entertained by equity courts, and proceedings by which a person is judicially declared to be of unsound mind or an habitual drunkard. Other species of equitable remedies have been created by statute in different states, which do not properly belong to any of the foregoing classes. The most important are the proceedings for the dissolution and winding up of corporations, and of enforcing the official

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[a] The text is cited in Hibernia Sav. & L. Soc. v. London & Lancashire Fire Ins. Co., 138 Cal. 257, 71 Pac. 334 (enforcing judgment lien against estate of decedent).

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[1] A few well-known equitable actions are wholly pecuniary in their object and relief, although not generally described as such. For example, the suit by the vendor for the specific performance of an ordinary land contract is really brought for the recovery of money alone, and it differs from the suit to enforce the vendor's lien in the fact that the judgment is for the recovery of the money generally, and not out of the land itself as a special fund.

(b) The text is cited in State v. Sunapee Dam Co. (N. H.), 55 Atl. 899, 912, where the question of damages in equity suits is very elaborately discussed.

(c) The text is cited to this effect in Blair v. Smith, 114 Ind. 114, 5 Am. St. Rep. 593, 15 N. E. 817. As to compensatory damages in equity, see *post,* § 237.

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[2] The strict foreclosure by which the mortgagor's equitable right of redemption is cut off, and the mortgagee's legal estate is perfected, is a remedy of an entirely different class; it is in fact a recovery of land, the acquisition of a complete title, the establishment of a perfect legal ownership.

(d) The text is quoted in Weldon v. Superior Court, 138 Cal. 427, 71 Pac. 502 (a case of equitable garnishment, authorized by statute, by a materialman, of funds due the contractor); and in Knapp, Stout & Co. v. McCaffrey, 178 Ill. 107, 69 Am. St. Rep. 290, 52 N. E. 898 (enforcing bailee's lien in equity).

(e) The text is quoted in Weldon v. Superior Court, 138 Cal. 427, 71 Pac. 502.

(f) That an action for divorce is a "case in equity" within the meaning of a constitutional provision conferring appellate jurisdiction in all cases in equity, see Sharon v. Sharon, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709.

duties of corporate officers. The remedial powers of equity are so broad and so flexible that there may be many other special forms of remedy belonging to its general jurisdiction, but depending so closely upon the peculiar circumstances and relations of the litigant parties that they do not admit of classification.

§ 113. The equitable remedies also differ from the legal ones in the manner of their administration. The common-law rules of procedure are fixed, rigid, arbitrary, technical, while those of the equity suit are natural and flexible. In no features is the contrast greater than in respect to parties and to judgments. The doctrines of the common law concerning the parties to actions, their joint or several rights and liabilities, and the form of judgment based upon these respective kinds of right and liability, are the crowning technicality of the system, resting upon verbal premises which mean nothing, and built up from these premises by the most accurate processes of mere verbal logic. It was a fundamental principle that no one could be a plaintiff unless he was alone or jointly with the co-plaintiffs entitled to the *whole* recovery, nor a defendant unless he was alone or jointly with the co-defendants liable to the *entire* demand. The common law knew no such thing as the making a person plaintiff who did not share the right of recovery, or defendant who was not liable for the whole claim, *merely for the purpose of binding him by the judgment and cutting off any possible right on his part.*[1] The judgment must be one single, entire recovery, both as affects the plaintiffs and the defendants; and no one could be a plaintiff who did not thus hold the legal title, even though all beneficial interest in the cause of action belonged to another. On this ground the assignor of a thing in action not negotiable must be the plaintiff, and the ability of an assignee to bring an action is wholly the result of statute. Where the action was by two or more plaintiffs, the judgment was necessarily a single one in favor of all considered as one undivided body. It was impossible that each one of several plaintiffs could recover a different sum of money by way of debt or damages. Even if the action was for the possession of chattels or land, different plaintiffs could not recover distinct chattels or tracts of land; the judgment was for all the chattels as one subject-matter, or for the whole land as a unit, and if the plaintiff's rights were different they must be undivided, so that each share, being as yet unpartitioned, should extend throughout the entire mass, and the judgment be for all as joint or co-owners. The same rule extended to the defendants. If there were two or more, one single judgment must be rendered against all; different recoveries against separate defendants in the same action were impossible. The common law permitted no affirmative relief, no recovery of debt or damages, land or chattels, in favor of a defendant against a plaintiff, except perhaps in the little used and now virtually obsolete legal action of "account." Even in the case of "Recoupment of Damages," which was a recent invention of the common-law courts, the demand on behalf of the defendant was only used *defensively*. The exceptional case of "Set-off," in which alone an affirmative recovery always pecuniary was ever possible in favor of the defendant, was wholly of a statutory origin.

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[1] This rule has been changed by the new procedure as adopted in several of the western states, which very properly requires that when an action is brought by the assignee of a thing in action, except of negotiable paper, the assignor must be made a party either plaintiff or defendant, so that he may be heard, if necessary, on the question as to the validity of the alleged assignment, and any future claim against the debtor on his part may be barred by the judgment. This innovation, which strikes at the very root of the common-law theory as to parties and judgments, has been in operation for years without the slightest difficulty, and its advantages are patent. This single fact demonstrates the utter worthlessness, the mere *verbal* character, of the so-called legal reasoning by which the common-law dogmas have been upheld.

§ 114. The equitable doctrines with respect to parties and judgments are wholly unlike those which prevailed at the common law, different in their fundamental conceptions, in their practical operation, in their adaptability to circumstances, and in their results upon the rights and duties of litigants. The governing motive of equity in the administration of its remedial system is to grant full relief, and to adjust in the one suit the rights and duties of all the parties, which really grow out of or are connected with the subject-matter of that suit.[a] Its fundamental principle concerning parties is, that all persons in whose favor or against whom there might be a recovery, however partial, and also all persons who are so interested, although indirectly, in the subject-matter and the relief granted, that their rights or duties might be affected by the decree, although no substantial recovery can be obtained either for or against them, shall be made parties to the suit; and it is not ordinarily a matter of substantial importance whether they are joined as plaintiffs or as defendants, although this question of procedure is regulated to a certain extent by rules based upon considerations of convenience rather than upon any essential requirements of the theory. The primary object is, that all persons sufficiently interested may be before the court, so that the relief may be properly adjusted among those entitled, the liabilities properly apportioned, and the incidental or consequential claims or interests of all may be fixed, and all may be bound in respect thereto by the single decree.[b]

§ 115. The fundamental principle of equity in relation to judgments is, that the court shall determine and adjust the rights and liabilities concerning or connected with the subject-matter of all the parties to the suit, and shall grant the particular remedy appropriate in amount and nature *to* each of those entitled to any relief, and *against* each of those who are liable, and finally shall so frame its decree as to bar all future claims of any party before it which may arise from the subject-matter, and which are within the

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(a) The text is quoted in Siever v. Union Pac. R. Co. (Nebr.), 93 N. W. 943.

(b) The text is quoted in Siever v. Union Pac. R. Co. (Nebr.), 93 N. W. 943 (injunction against a multiplicity of garnishment suits to reach exempt wages); cited in Behlow v. Fisher, 102 Cal. 208, 36 Pac. 509 (dissenting opinion; dissolution of partnership).

scope of the present adjudication.[a] In rendering its decree, a court of equity is not hampered by any of the arbitrary regulations which restrict the action of common-law tribunals; and especially, it is not bound to give a single judgment in favor of the co-plaintiffs regarded as one body, nor against the defendants as a group of persons jointly or equally liable. In this respect it possesses a full freedom to adapt its relief to the particular rights and liabilities of each party, and to determine the special interests of all, so far as they are legitimately connected with the subject-matter, and properly within the scope of the adjudication. It has power to grant relief to some of the co-plaintiffs, and not to others, and against some of the co-defendants, and not against others; it can confer different reliefs in kind and extent to different plaintiffs and against different defendants; it can bestow affirmative relief upon all or some of the defendants against all or some of the plaintiffs; and finally, it can determine and adjust the rights and duties of the co-plaintiffs, or of the co-defendants, as between themselves. I would not be understood as asserting that this extreme flexibility or apportionment of remedies and obligations is common in ordinary equitable suits, nor that it is without limit and control; on the contrary, it is regulated by rules of pleading and procedure so contrived that all parties may be informed of the claims made against them, and of the liabilities to which they are exposed. My object here is simply to state the general principles of the Equity Remedial System, and to describe the power which inheres in a court of equitable jurisdiction to mold its decree and to adjust its reliefs so as to establish and enforce the particular rights and liabilities, legitimately connected with the subject-matter, and within the scope of the judgment, of all the parties to the action. The modes in which this power should be exercised according to the

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(a) The text was quoted in Union Mill & Mining Co. v. Dangberg, 81 Fed. 73, 119, by Hawley, D. J., and the principle applied in a decree apportioning the use of the waters of a stream among numerous riparian proprietors.

rules of pleading and procedure must be considered in another place.

§ 116. The remedial system of equity as a whole, with its great variety of specific remedies which enforce the very primary rights and duties of persons rather than give pecuniary equivalents for their violation, with its power to enlarge the scope of these ordinary forms of relief, and even to contrive new ones adapted to new circumstances, with its comprehensive rules concerning parties, and with its unlimited control over the form and material of its judgments, possesses enormous advantages over the narrow, inflexible, and artificial methods of the common law. The reformed American procedure has attempted to combine the two, or rather to enlarge the equity doctrines and rules, so that they may embrace all actions, legal as well as equitable; and in those states where the courts have accepted and carried out the reform in its true spirit, this attempt has been successful as far as is possible from the essential elements of the two jurisdictions. A complete amalgamation, however, is not possible, so long as the jury trial is retained in legal actions. There is certainly no impossibility nor even difficulty in requiring a jury to decide the issues of fact upon which the right to many kinds of equitable remedy depends; this is the province of a jury in legal actions, the court pronouncing the judgment upon their verdict. A jury is clearly incompetent to frame and deliver a decree according to the doctrines and methods of equity; but there can be no real obstacle in the way of its ascertaining the facts by its verdict, and leaving the court to shape the decree and award the relief based upon these facts in many species of equitable remedy. That the *issues of fact* may be complicated is no insurmountable difficulty; for no issues of fact are ordinarily more complicated than those involving elements of fraud, which have always been regarded as peculiarly within the province of a jury.[1] There are, however, classes of equitable suits in which the issues of fact upon which the relief depends are so intimately connected with the relief itself that their decision is plainly beyond the competence of a jury, and must of necessity be left to the court or judge. Of this character, for example, are all suits for the distribution and marshaling of assets, and in fact all those in which the final relief depends upon an accounting. While a partial amalgamation of law and equity into one remedial system may be theoretically possible by extending the jury trial to certain equitable actions in which it is not now used, I am strongly of the opinion that the jury trial in civil causes of a legal nature is a practical obstacle to any more complete combination of the two systems than has already been accomplished by the reformed procedure.[2]

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[1] **This proposition of the text, which might otherwise have been regarded as a mere theoretical conception, has been actually wrought out into practice by**

§ 117. To sum up the discussions of the foregoing section: The entire municipal law, so far as it is concerned with private civil relations, comprises,—1. Legal rules defining legal primary rights and duties applicable to most of the facts and circumstances which have been brought within the range of jural relations; 2. Legal rules defining legal remedial rights and duties and remedies, which are few in number, and very limited in their nature and form; 3. Equitable rules defining equitable primary rights and duties applicable to certain classes of jural relations,

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the courts of Pennsylvania. For a long term the legislature of that state refused to confer *any* equitable jurisdiction upon its courts. As a consequence, and in order to prevent a failure of justice, the courts contrived a system of administering many equitable remedies and enforcing many equitable rights by means of the common-law forms of action. This was accomplished in the manner suggested in the text. In the common-law action the facts showing the equitable right were admitted into the pleadings, the jury passed upon the issues of fact, legal and equitable, and on their verdict the court rendered its judgment, which, by being made conditional, was enabled in an indirect manner to maintain the equitable right and grant the equitable remedy. In this manner the common-law action of ejectment was made the means of enforcing specific performance, and of protecting the equitable estates of parties, where their land was held under an implied trust, etc.

[2] See Pomeroy on Remedies and Remedial Rights, §§ 51, 52, in which this question is more fully examined.

which rights and duties are supplementary and additional rather than contradictory to the legal ones affecting the same relations; 4. Equitable rules defining equitable primary rights and duties applicable to a comparatively few facts and circumstances, which are actually conflicting with the corresponding legal rights and duties; 5. Equitable rules defining equitable remedial rights and duties and remedies, which are much more various in their nature and form, specific in their object, and flexible in their operation, than the remedies supplied by the law. There is, therefore, no clashing nor uncertainty with respect to the final absolute rights and duties of individuals, except so far as such conflict or doubt may arise from the comparatively few rules of the fourth class, where the antagonism between equity and the law does actually exist. It is certainly strange, inexplicable except upon historical grounds, that in an age and country advanced in civilization, the municipal law should present such an anomaly, that a married woman's agreement, for example, should be utterly void by the rules of the law, while, according to the doctrines of equity, it might be valid and enforceable out of her separate estate; or that a certain contract for the sale of land should be treated as an absolute nullity by a court of law, and should be regarded as binding and specifically executed by a court of equity. If any change, however, is to be made for the purpose of removing this discord, it must be in the legal and not in the equitable rules. The latter are, in all instances, the more just, and more in accordance with the sentiments and opinions of the age; while the former are necessarily subordinate, some of them have become practically obsolete, and all of them would be totally abandoned in any thorough revision or scientific codification of our entire jurisprudence.

SECTION V.

THE PRINCIPLES OF CLASSIFICATION.

ANALYSIS.

§ 118. Importance and difficulty of a correct classification.
§§ 119, 120. Different grounds which might be taken for a classification.
§§ 121–125. Ordinary mode of classification according to the nature of the jurisdiction.
§ 121. In the three divisions of exclusive, concurrent, and auxiliary.
§§ 122, 123. Different modes of carrying out this system by various writers.
§§ 124, 125. Fundamental objections to this system of classification.
§§ 126, 127. The true principles of classification in the present condition of Equity.
§ 128. Plan and order of arrangement adopted in this treatise.

§ 118. **Importance and Difficulty of a Correct Classification.**— The practical as well as the scientific value of a treatise on equity jurisprudence must largely depend upon the Principles of Classification adopted in the arrangement and discussion of the subject-matter. At the very outset, however, we encounter a most serious obstacle. From the partial character of equity as a system, from the fact that it covers only a comparatively small portion of the doctrines and rules, facts and circumstances, embraced in the entire national jurisprudence, its orderly and consistent arrangement necessarily becomes a matter of great difficulty. There are so many breaks, omissions, and, so to speak, empty spaces in the system of equity, that it is almost impossible to follow any one plan or method throughout the whole extent. It is plain, however, that the principles and modes adopted should conform to the present condition of equity, and to its existing relations with the law.

§ 119. **Different Grounds of Classification.**— There are several features or elements of the equity jurisprudence which might, with more or less propriety, be selected as the basis of a classification. Among these are certain important external facts or events, such as Fraud, Mistake, Accident, and the like, which are the occasions of numerous equitable rules. These external facts have been treated by some writers as distinct heads or departments of equity jurisprudence, and they are often so described in the general language of judicial opinions. A jurisprudence, however, does not consist of the mere facts or events which are the *occasions* of rules and rights, but of the rules which create the rights, and of the rights and duties themselves which result from these rules. Although such external facts and events as fraud, mistake, accident, and the like are the occasions of numerous equitable rules, and therefore figure largely in the practical workings of the equitable jurisdiction, they are also the occasions from which many legal rules and rights take their origin; they are not peculiar to equity, and if adopted as a basis of classification, would tend to confuse its doctrines with those of the law. There is another objection, of much more weight. These external facts are the sources of a great variety both of rights and remedies. Fraud, for example, affects a large part of equity jurisprudence. It is the occasion of equitable rights of property, of equitable rights concerning contract, of equitable rights growing out of special personal relations, such as *cestui que trust* and trustee, and of many equitable remedies, such as cancellation, reformation, specific enforcement, accounting,[a] and others. It is plain, therefore, that these species of external facts and events, important as they undoubtedly are, do not furnish any sufficient basis for a practical nor for a scientific classification. They do not suggest any grounds for discriminating between rights and remedies which are essentially different; they would tend to produce confusion, rather than to supply a means of analyzing and arranging the doctrines in an orderly and distinct manner.

§ 120. Another possible basis for a classification might be found in certain grand underlying principles, which are often called the Maxims of Equity, of which the following are given merely as examples: He who seeks equity must do equity; equality is equity; equity regards as done what ought to be done; equity looks at the substance and real intent, and not at the form, etc. It must be said of these grand principles, that they are a component part of equity jurisprudence, and not mere external facts or events, like fraud and mistake. They are the fruitful sources of doctrine whence are derived a vast number of particular rules concerning both primary rights and remedies. But the objection last mentioned in the preceding paragraph applies with even greater force to them. These principles are too broad, comprehensive, and, so to speak, universal, to be taken as the basis of any practical classification. They run through all parts of the system, and are the source of so many and different rights and remedies, that they furnish no lines of division nor grounds of distinguishing one from another, and of arranging the whole according to any fixed plan. These principles in themselves are of the highest importance to an accurate understanding of equity as a whole; they are the unfailing fountains whence flow the various streams of right and justice; the perennial sources of practical rules applicable to the ever-changing events of the social life; the foundation-stones upon which the beautiful structure of equity has been erected. The student who has made all these principles a part of his mental habit, who has, as it were, incorporated them into his very intellectual being, has already mastered the *essence* of equity, and has made the acquisition of its particular rules an easy and delightful labor.[a]

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[a] The text is cited in Stockton v. Anderson, 40 N. J. Eq. 486, 4 Atl. 642; McCormick v. Hartley, 107 Ind. 248, 6 N. E. 357.

§ 121. **Ordinary Mode of Classification.**— The plan of arrangement which has been followed by most authors of general treatises is based upon the relations which formerly existed between equity and the law when the two jurisdictions were as yet wholly distinct, and were administered by separate tribunals. Its divisions were made,

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(a) The text is cited in Otis v. Gregory, 111 Ind. 504, 13 N. E. 39.

not according to any inherent quality or nature either of rights or remedies, but according to a purely accidental quality of the *jurisdiction*. The fact that this jurisdictional criterion was merely accidental and incidental, is demonstrated by its having been utterly abolished in England and in many of our states without any change in the equitable rights and remedies themselves, but with only a change in the mode of administering those rights and remedies by a separate judicial proceeding. This plan of classification separates the whole body of equity into the three following grand divisions: 1. That containing the matters in respect of which courts of equity had an exclusive jurisdiction; 2. That containing matters in respect of which courts of equity had jurisdiction concurrently with courts of law; 3. That containing matters in respect of which the equity jurisdiction, though exclusive, was wholly exercised in aid of certain actions or proceedings which belonged exclusively to courts of law. In brief, the classification which has ordinarily been adopted in the text-books is, the Exclusive Jurisdiction, the Concurrent Jurisdiction, and the Auxiliary Jurisdiction.

§ 122. Before examining the merits of this plan, a brief description of the manner in which it has been followed by different authors will be given. A great diversity exists among text-writers who have adopted this plan, in the modes which they have employed, in the accuracy and consistency with which they have adhered to the principles, in the *criteria* which they have taken to determine the nature and scope of the three grades of jurisdiction, and, as a consequence, in their arrangement of particular topics and heads of equity in one or the other of these three divisions. By some writers the element of exclusiveness or of concurrence in the jurisdiction has been regarded more in connection with the primary rights, estates, and interests created by equity than with its remedies. But they have not followed this method consistently, since their order of arrangement has, to a partial extent, been determined by the nature of the remedies, and even by mere external facts or events which are the occasions of rights and duties. It has resulted from this radical difference in their mode of interpreting and carrying out the plan, that there is no agreement among these authors in their arrangement of particular topics under the three general divisions of jurisdiction.[1]

§ 123. Other authors, in adopting this general plan of classification, have applied the criterion of exclusiveness or concurrence wholly to the remedies which equity gives, and have determined the various topics falling within one or the other of the three divisions in accordance with the nature of these remedies; that is, whether they belong exclusively to the equity jurisdiction, or are conferred by the law courts, or are entirely auxiliary to the prosecution of legal actions. This method has the advantage of consistency and simplicity, and is not open to the objection of confusion; but it necessarily places the primary rights and duties of equity in a very subordinate position, and thus presents a one-sided and even misleading view of the equity jurisprudence considered in its totality.[1] Some text-writers of high reputation, while professing to classify particular topics under the three divisions according to the nature of the remedies, have failed to carry out this mode of arrangement with consistency, and have thus left the student without any certain clew to their system of classification.[2]

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§ 122, [1] I take simply as an illustration the Principles of Equity, by E. H. T. Snell (London, 1874). In the "Concurrent" jurisdiction, this author places both "Specific Performance" and "Injunction," although as remedies both are exclusively equitable. The reason of this arrangement seems to be that the law has jurisdiction over contracts generally, and over some of the rights and interests which may be protected by injunction. Under the "Auxiliary" jurisdiction, he strangely enough places the remedy of "Cancellation," "Bills to Establish Wills," "Bills Quia Timet," and "Bills of Peace." The first of these is an exclusive equitable remedy, and is constantly used as a means of establishing or restoring equitable rights and estates. The three others are in every case final reliefs, declaring and establishing rights of property. It is difficult to conceive how a suit to "quiet title" can be regarded as belonging to the "Auxiliary" jurisdiction. This author, like many others, places fraud, actual or constructive, mistake, and accident as distinct heads of concurrent jurisdiction. The objections to such an arrangement are patent. In the first place, as already said, these matters are not in any sense *parts of equity jurisprudence.* In the second place, they are the occasions whence equitable primary rights and remedies of the most exclusive character take their rise, as well as those which are legal.

§ 123, [1] By far the best example of this method, I think, is the Doctrine of Equity, by John Adams, 6th Am. ed., 1873. His three chief divisions are:

§ 124. Even if the plan of classification according to the nature of the equity jurisdiction, considered in its relations with that of the law, possessed at one time certain practical advantages which on the whole rendered it preferable to any other (and I do not admit this proposition as unquestionably true), the recent and great changes made

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1. Jurisdiction in cases in which the law courts cannot *enforce* a right; meaning thereby a remedial right, and intending to include in the division those remedies which are *exclusively* equitable. Under this head he places Specific Performance, Reformation, Cancellation and Rescission, Injunction, Bills of Peace and to Quiet Title, Suits to Foreclose or to Redeem Mortgages, Enforcement of Trusts, and others. 2. Jurisdiction in cases in which the law courts cannot *administer* a right,—that is, cannot fully and advantageously enforce it; the division including remedies which are within the *concurrent* jurisdiction of equity. Under this head he ranges Account, Partition, Settlement of Partnership Matters and Estates of Decedents, Marshaling of Assets, Contribution and Exoneration, etc. 3. Jurisdiction which is wholly auxiliary, including only Discovery, Perpetuation of Testimony, and Examination of Witnesses abroad. This author is perfectly consistent in following out the principles which he has adopted; and he does not fall into the common error of taking fraud, mistake, accident, and the like as distinct heads of equity jurisprudence. The result is, that Mr. Adams's book is clear, distinct, without confusion, and from his stand-point presents a very correct and consistent view of equity. But this view is certainly a partial one. The representation of equity as consisting wholly of remedies is incorrect in its fundamental conception, and when all equitable primary rights, interests, and estates are treated merely as incidents of the remedies, such a representation is actually made, even though it was undesigned on the part of the author.

[2] It cannot be denied that Judge Story's Commentaries are liable to this criticism, and the result is plainly shown in his classification and arrangement and treatment of particular topics. While certain remedies are properly ranged under the exclusive jurisdiction, and others under the concurrent, as is done by Mr. Adams, this criterion is often abandoned; no clear distinction is made between remedies or the rights to them, and the equitable estates, interests, rights, and obligations which are primary in their nature; and finally, the mere external facts of fraud, mistake, etc., are regarded as veritable and important heads of equity jurisprudence, and are discussed at great length.

by statute have, in England, and in many of the states entirely, and in other states to a large extent, destroyed the basis of fact — the relations between equity and the law — upon which the very principles of the classification were founded. In England and in all the commonwealths of this country where the reformed procedure prevails, there is no longer any auxiliary jurisdiction of equity, nor any reason for calling its remaining functions either exclusive or concurrent, since legal and equitable primary rights are maintained, legal and equitable remedial rights are enforced, and legal and equitable remedies are granted by the same tribunal and in the same action. In most of the remaining states where the two jurisdictions are still kept distinct, the "auxiliary" equitable proceedings have either been abolished or have become practically obsolete; and in all of them the powers of the law courts have been so enlarged, equitable rights and interests are to such an extent cognizable by way of defense in legal actions, and so many matters which once came within the province of equity have been placed under a complete system of statutory regulation, and their administration given to special tribunals, that the ancient separation into exclusive jurisdiction no longer furnishes an adequate nor even a true principle upon which to classify the body of equity jurisprudence. This method, which has been commonly adopted by text-writers, is therefore in direct conflict with the reformed procedure now used in more than half of the states and territories, as well as in England and its chief colonial dependencies; and it is also opposed to the tendencies of legislation in all the other states, with a very few exceptions. There is nothing which so hinders the progress of legal reform, and so long delays the general acceptance according to its true intent of a new legal system, as the persistent retention of the nomenclature, methods, and classification which had been established as the outgrowth and formal expression of the ancient notions discarded and abandoned by the legislative enactment. For this reason, if for no other, I am strongly of the opinion that a plan of arranging and presenting the equity jurisprudence which had its origin solely in the fact that law and equity were originally two distinct jurisdictions, and were administered by separate tribunals, is not at all adapted to the condition of the municipal law, and of the relations between its departments, which now exists throughout the United States, nor to the national tendencies shown in the changes which are constantly made by the state legislatures, especially the tendencies towards a scientific revision and codification of the municipal law, which will more and more obliterate the *external* distinctions between equity and the law.

§ 125. There is, however, another, and as it seems to me more fundamental, objection to this method of classification, based upon the assumed relations between legal and equitable jurisdiction. Whenever some single feature or partial element of an extensive system is taken as the basis of classifying its component parts, the inevitable result must be an imperfect and even incorrect view of the system as a whole. The choice of the equitable remedies alone as the fixed points to which all doctrines and rules are referred, and the classification of these remedies solely according to their relations with the jurisdictions possessed by the two courts, have tended irresistibly to produce a confused and one-sided conception of the nature and functions of equity.[1] Under the influence of such a conception, some writers have taught that equity consists entirely of certain remedies, and have denied that it creates any primary rights and duties whatever. I have already shown the erroneous character of this theory, and shall not dwell upon it further.

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[1] As an illustration of this proposition, it is impossible to lay down any comprehensive, complete, and accurate rules concerning the extent of the equity jurisdiction, when the equitable and legal remedies are taken as the only elements for determining the question. The primary rights, estates, and interests created by equity must necessarily enter into any general solution of the problem.

§ 126. **True Principles of Classification.**— A comprehensive treatment of equity which shall conform to its real nature and its present condition as a branch of the jurisprudence now existing in the United States should present all of its component parts in their true relations with each other and with the law, and should adopt such principles of classification as will follow the essential lines of separation between these parts, and furnish a correct and practical guide for the student and the lawyer. No method can be accurate nor really practical which, in the first place, does not recognize the fact that equity consists of two grand divisions, the Primary Rights and Duties, Estates and Interests which it creates, and the Remedial Rights and Duties enforced by the various Remedies which it confers; and which, in the second place, does not present the principles, doctrines, and rules concerning these Primary Rights, Estates, and Interests, separate and distinct from those which relate to the Remedial Rights and Remedies. The classification of the remedies, being no longer based upon any notion of exclusive and concurrent jurisdictions, should be made in accordance with their own inherent nature and the nature of the primary rights, the violation of which they are intended to redress or relieve. Underlying these equitable estates, interests, and rights, and these equitable remedies, and constituting the sources from which most of them have been derived, there are certain equitable principles of a most broad, comprehensive, and general nature and application. These principles run through every branch of the equity jurisprudence; from them a large part of the particular doctrines and rules of that system, both concerning equitable estates and interests, and equitable remedies, have been developed. They seem to require, therefore, in any well-constructed arrangement, a separate treatment, preliminary to the examination of those more special topics which are directly connected with the equitable estates, interests, rights, and remedies.

§ 127. The order which should be observed in the treatment of these two grand divisions which make up the whole of equity jurisprudence may well be determined by considerations of convenience, rather than by the requirements of a scientific precision. The division of equity which is concerned solely with remedies is much broader and more comprehensive than that which is concerned with equitable primary rights and interests. The remedies administered by equity are not confined to cases in which equitable primary rights have been violated; they are not restricted to the single purpose of maintaining equitable estates and interests. As has already been stated in a preceding section, the peculiar reliefs of equity are given, under certain well-established conditions of fact, for the violation of legal primary rights and for the protection and support of legal estates and interests. In other words, while every equitable right and interest is enforced and preserved by an appropriate equitable remedy, the remedial jurisdiction of equity extends beyond these somewhat narrow limits, and embraces many classes of legal rights and interests for the violation of which, under the existing circumstances, the law gives no adequate relief. Before, however, entering upon either of these two grand divisions of the work, a preliminary investigation into the nature and extent of the equity jurisdiction is necessary as a foundation for all subsequent discussions.

§ 128. I shall in the following treatise adopt the general plan, principles of classification, and method of treatment described in the foregoing paragraphs. The entire work will be separated into four parts. *Part First* will contain an inquiry into the nature and extent of the Equity Jurisdiction as it now exists in the United States, both in its original and general form, and as limited or regulated by the statutory legislation of the various states and of the Congress of the United States. The three remaining parts will treat of the Equity Jurisprudence, or the doctrines which are administered by the courts in the exercise of their equitable *jurisdiction*. *Part Second* will discuss the grand principles and maxims which are the foundation of Equity Jurisprudence, and the sources of its particular doctrines, and will also describe some of the most important facts and events which are the *occasions* of equitable primary and remedial rights and duties. *Part Third* will contain that portion of Equity Jurisprudence which consists of Primary Rights and Duties, or in other words, of equitable estates, titles, and interests. *Part Fourth* will contain that portion of Equity Jurisprudence which consists of remedial rights and duties and of remedies. This description does not include any discussion of mere procedure. The term " Remedies," as it has been defined, and as it will be used throughout the book, does not embrace the rules of procedure, but only the reliefs which are granted for a violation, actual or threatened, of legal and equitable rights.

PART FIRST.

PART FIRST.

THE NATURE AND EXTENT OF EQUITY JURISDICTION.

CHAPTER FIRST.

THE GENERAL DOCTRINE CONCERNING THE JURISDICTION.

SECTION I.

FUNDAMENTAL PRINCIPLES AND DIVISIONS.

ANALYSIS.

§ 129. Equity jurisdiction defined.
§ 130. Requisites in order that a case may come within it.
§ 131. Distinction between the existence of equity jurisdiction and the proper exercise of it.
§ 132. Inadequacy of legal remedies, how far the test.
§ 133. Equity jurisdiction depends on two facts: the existence of equitable interests, and the inadequacy of legal remedies.
§§ 134, 135. How far the jurisdiction is *in personam*, how far *in rem*.
§ 136. Equity jurisdiction threefold,—exclusive, concurrent, and auxiliary.
§§ 137, 138. What embraced in the exclusive jurisdiction.
§§ 139, 140. What embraced in the concurrent jurisdiction.
§ 141. Cases may fall under both.
§§ 142–144. What embraced in the auxiliary jurisdiction.
§ 145. Order of subjects.

§ 129. **Equitable Jurisdiction Defined.**— It is important to obtain at the outset a clear and accurate notion of what is meant by the term "Equity Jurisdiction." It is used in contradistinction to "jurisdiction" in general, and to "common-law jurisdiction" in particular. In its most general sense the term "jurisdiction," when applied to a court, is the power residing in such court to determine judicially a given action, controversy, or question presented to it for decision. If this power does not exist with reference to any particular case, its determination by the court is an absolute nullity; if it does exist, the determination, however erroneous in fact or in law, is binding upon the parties until reversed or set aside in some proceeding authorized by the practice, and brought for that express purpose.[1] It is plain that the term used in this strict sense *may* be applied to courts of equity as well as to any other tribunals. With this signification of the word, it would be said that an equity court has no jurisdiction to try the issues arising upon an indictment, and to render judgment in a criminal prosecution; the entire proceeding would be null and void. On the other hand, it is equally plain that this strict meaning is not always given to the term " equity jurisdiction," as it is ordinarily used. The proceedings and judgment of a court of chancery or of a court clothed with equity powers are not *necessarily* null and void because the action is not one which comes within the scope of the " equity jurisdiction " in the common acceptation of that phrase, or in other words, because the claim is one for which there is a full, adequate, and complete remedy at law.[2] This well-settled rule furnishes a decisive test, and shows that when ordinarily speaking of the " equity jurisdiction " we do not thereby refer to the general power inherent in a court to decide a controversy at all,— a power so essential that its absence renders the decision a mere nullity, but we intend by the phrase to describe some more special and limited judicial authority.

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[1] The true meaning of "jurisdiction" is so often misunderstood, and the word is so often misapplied, that I shall quote a passage from the opinion of Mr. Justice Folger in the recent case of Hunt v. Hunt, 72 N. Y. 217, 228–230, 28 Am. Rep. 129, in which the subject is explained in a very clear and convincing manner: "Jurisdiction of the subject-matter does not depend upon the ultimate existence of a good cause of action in the plaintiff in the particular case. See Groenvelt v. Burwell, 1 Ld. Raym. 466, 467. A court may have jurisdiction of all actions in assumpsit of that subject-matter. An action by A in which judgment is demanded against B, as the indorser of a promissory note, falls within that jurisdiction. Such court may entertain and try the action, and give a valid and effectual judgment in it. Though it should appear in proof that there never had been presentment and demand, nor notice of non-payment, yet a judgment for A against B, though against the facts, without facts to sustain it, would not be void as rendered without jurisdiction. It would be erroneous, and liable to reversal on review. Until reviewed and reversed, it would be valid and enforceable against B, and entitled to credit when brought in play collaterally. Jurisdiction of the subject-matter is power to adjudge concerning the general question involved, and is not dependent upon the state of facts which may appear in a particular case, arising, or which is claimed to have arisen, under that general question. One court has jurisdiction in criminal cases; another in civil cases; each in its sphere has jurisdiction of the subject-matter. Yet the facts, i. e., the acts of the party proceeded against, may be the same in a civil case as in a criminal case; as, for instance, in a civil action for false and fraudulent representations and deceit, and in a criminal action for obtaining property by false pretenses. We should not say that the court of civil powers had jurisdiction of the criminal action, nor *vice versa*, though each had power to pass upon allegations of the same facts. So there is a more general meaning to the phrase 'subject-matter,' in this connection, than power to act upon a particular state of facts. It is the power to act upon the general, and, so to speak, the abstract, question, and to determine and adjudge whether the particular facts presented call for the exercise of the abstract power. A suitor for a divorce may come into any court of the state in which he is domiciled, which is empowered to entertain a suit therefor, and to give judgment between husband and wife of a dissolution of their married state. If he does not establish a cause for divorce, jurisdiction to pronounce judgment does not leave the court. It has power to give judgment that he has not made out a case. That judgment would be so valid and effectual as to bind him thereafter, and to be *res adjudicata* as to him in another like attempt by him. If

§ 130. " Equity jurisdiction," therefore, in its ordinary acceptation, as distinguished on the one side from the gen-

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that court, however, should err, and give judgment that he had made out his case, jurisdiction remains in it so to do. The error is to be corrected in that very action. It may not be shown collaterally to avoid the judgment, while it stands unreversed. The judgment is in such case also *res adjudicata* against the party cast in the judgment. We conclude that jurisdiction of the subject-matter is the power lawfully conferred to deal with the general subject involved in the action."

[2] Bank of Utica v. Mersereau, 3 Barb. Ch. 528; Cummings v. Mayor, etc., 11 Paige, 596; Creely v. Bay State B. Co., 103 Mass. 514; Amis v. Myers, 16 How. 492, 493; Sexton v. Pike, 13 Ark. 193. In some instances where the facts very clearly bring the case within the common-law jurisdiction, the court of equity will itself take the objection at any stage of the suit and dismiss it, even though no objection had been raised by the parties; but even in such cases a judgment of the equity court sustaining the action and granting the relief would not *necessarily* be a nullity. See Parker v. Winnipiseogee Co., 2 Black, 545, 550, 551; Hipp v. Babin, 19 How. 271, 277, 278.

eral power to decide matters at all, and on the other from the jurisdiction "at law" or "common-law jurisdiction," is the power to hear certain kinds and classes of civil causes according to the *principles* of the method and procedure adopted by the court of chancery, and to decide them in accordance with the doctrines and rules of equity jurisprudence, which decision may involve either the determination of the equitable rights, estates, and interests of the parties to such causes, or the granting of equitable remedies. In order that a cause may come within the scope of the equity jurisdiction, one of two alternatives is essential; either the primary right, estate, or interest to be maintained, or the violation of which furnishes the cause of action, must be equitable rather than legal;[1] or the remedy granted must be in its nature purely equitable, or if it be a remedy which *may* also be given by a court of law, it must be one which, under the facts and circumstances of the case, can only be made complete and adequate through the equitable modes of procedure.[2] At the same time, if a court clothed with the equity jurisdiction as thus described should hear and decide, according to equitable methods, a case which did not fall within the scope of the equity jurisprudence, because both the primary right invaded constituting the cause of action and the remedy granted were wholly legal, and belonging properly to the domain of the law courts, such judgment, however erroneous it might be and liable to reversal, would not *necessarily* be null and void.[3] [a] On the contrary, as will be more fully stated hereafter, the objection that the case does not come within this so-called equity jurisdiction must ordinarily be definitely raised by the defendant at the commencement of the proceedings, or else it will be regarded as waived, and the judgment will not even be erroneous.[4] In some instances, however, where the equitable functions of the court are specifically defined by statute, or the facts show very clearly that the rights involved in the controversy and the remedies demanded are purely legal, and completely within the scope of ordinary legal proceedings, the court of equity will itself take the

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[1] Reese v. Bradford, 13 Ala. 837; Sessions v. Sessions, 33 Ala. 522, 525; Torrey v. Camden, etc., R. R. Co., 18 N. J. Eq. 293; Ontario Bank v. Mumford, 2 Barb. Ch. 596, 615; Woodruff v. Robb, 19 Ohio, 212, 214; Wolfe v. Scarborough, 2 Ohio St. 361, 368; Heilman v. Union Canal Co., 37 Pa. St. 100, 104; McCullough v. Walker, 20 Ala. 389, 391; Wolcott v. Robbins, 26 Conn. 236; Green v. Spring, 43 Ill. 280; Vick v. Percy, 7 Smedes & M. 256, 268, 45 Am. Dec. 303; Abbott v. Allen, 2 Johns. Ch. 519, 7 Am. Dec. 554; Waddell v. Beach, 9 N. J. Eq. 793, 795; Milton v. Hogue, 4 Ired. Eq. 415, 422; Johnson v. Connecticut Bank, 21 Conn. 148, 157; Perkins v. Perkins, 16 Mich. 162, 167; Bolles v. Carli, 12 Minn. 113, 120; Echols v. Hammond, 30 Miss. 177; Hipp v. Babin, 19 How. 271, 277, 278; Wing v. Hall, 44 Vt. 118, 123; Detroit v. Board of Public Works, 23 Mich. 546, 552; Simmons v. Hendricks, 8 Ired. Eq. 84–86, 55 Am. Dec. 439; Pratt v. Northam, 5 Mason, 95, 104; Thompson v. Brown, 4 Johns. Ch. 619, 631; Hunt v. Danforth, 2 Curt. 592, 603; Gay v. Edwards, 30 Miss. 218, 230; Bush v. Golden, 17 Conn. 594; Gilliam v. Chancellor, 43 Miss. 437, 5 Am. Rep. 498.

[2] Brinkerhoff v. Brown, 4 Johns. Ch. 671; Mason v. Piggott, 11 Ill. 85, 89; Claussen v. Lafrenz, 4 G. Greene, 224–227; Kimball v. Grafton Bank, 20 N. H. 347, 352; Ferson v. Sanger, Daveis, 252, 259, 261; Curtis v. Blair, 26 Miss. 309, 327, 59 Am. Dec. 257; Dickenson v. Stoll, 8 N. J. Eq. 294, 298; Perkins v. Perkins, 16 Mich. 162, 167; Barrett v. Sargeant, 18 Vt. 365, 369; Jordan v. Faircloth, 27 Ga. 372, 376; Bassett v. Brown, 100 Mass. 355; Morgan v. Palmer, 48 N. H. 336; Hall v. Joiner, 1 S. C. 186; Matter of Broderick's

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Will, 21 Wall. 503, 504; Comstock v. Henneberry, 66 Ill. 212; Suter v. Matthews, 115 Mass. 253; Santacruz v. Santacruz, 44 Miss. 714, 720; Glastenbury v. McDonald's Administrator, 44 Vt. 450, 453; Brandon v. Brandon, 46 Miss. 222, 231; Scruggs v. Blair, 44 Miss. 406, 412; Carr v. Silloway, 105 Mass. 543; Sanborn v. Braley, 47 Vt. 171; Doremus v. Williams, 4 Hun, 458; Carlisle v. Cooper, 21 N. J. Eq. 576; Edsell v. Briggs, 20 Mich. 429; McGunn v. Huntin, 29 Mich. 477; Gay v. Edwards, 30 Miss. 218, 230.

[3] This conclusion results from the principle laid down by Folger, J., in the passage above cited. If the *court* has jurisdiction over the subject-matter of equitable rights, interests, and remedies, its jurisdiction does not depend upon its deciding *correctly* as to the existence of such rights, or as to the granting of such remedies. The jurisdiction itself exists independently of the particular case over which it is exercised; jurisdiction, in its most general and accurate sense of a power to decide concerning certain subject-matter, involves the power to decide wrongly as well as correctly.

[4] Cummings v. Mayor, etc., 11 Paige, 596; Bank of Utica v. Mersereau, 3 Barb. Ch. 528; Amis v. Myers, 16 How. 492; Creely v. Bay State B. Co., 103 Mass. 514; Sexton v. Pike, 13 Ark. 193.

(a) The text is cited to this effect in Freer v. Davis, 52 W. Va. 1, 94 Am. St. Rep. 895, 43 S. E. 164, 172, dissenting opinion; the majority holding that consent cannot confer jurisdiction to try a disputed title in suit to enjoin trespass.

objection at any stage of the cause, and will dismiss the suit, although no objection has in any way been raised by the parties.[5] [b]

§ 131.[a] It is plain, from the foregoing definitions, that the question whether a given case falls within the equity jurisdiction is entirely different and should be most carefully distinguished from the question whether such case is one in which the relief peculiar to that jurisdiction should be granted, or in which the equity powers of the court should be exercised in maintaining the primary right, estate, or interest of the plaintiff. The constant tendency to confound these two subjects, so essentially different, has been productive of much confusion in the discussion of equitable doctrines. Equity jurisdiction is distinct from equity jurisprudence. One example will suffice to illustrate this important proposition. A suit to enforce the specific performance of a contract, or to reform a written instrument on the ground of mistake, must always belong to the equity jurisdiction, and to it alone, since these remedies are wholly beyond the scope of common-law methods and courts; but whether the relief of a specific performance, or of a reformation, shall be granted in any given case, must be determined by an application of the doctrines of equity jurisprudence to the special facts and circumstances of that case. The same is true of every species of remedy which may be conferred, and of every kind of primary right, estate, or interest which may be enforced or maintained, by a court possessing the equitable jurisdiction. In other words, the equity jurisdiction may exist over a case, although it is one which the doctrines of equity jurisprudence forbid any relief to be given, or any right to be maintained.

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[5] Hipp v. Babin, 19 How. 271, 278; Parker v. Winnipiseogee Co., 2 Black, 545, 550, 551.

(b) This passage of the text is quoted in Hanna v. Reeves, 22 Wash. 6, 60 Pac. 62, but held not applicable to the facts of the case.

(a) The text is cited in Thorn & Hunkins Lime & Cement Co. v. Citizens' Bank, 158 Mo. 272, 59 S. W. 109.

This conclusion is very plain, and even commonplace; and yet the "equity jurisdiction" is constantly confounded with the right of the plaintiff to maintain his suit, and to obtain the equitable relief. This is, in fact, making the power to decide whether equitable relief should be granted to depend upon, and even to be identical with, the actual granting of such relief.

§ 132. **Extent of the Jurisdiction.**— Having thus generally defined "equity jurisdiction," I shall proceed with the most important and practical inquiry as to its extent and limitations, and with the examination of the kinds and classes of cases over which it may be exercised. The attempt has been made to furnish one comprehensive test for the solution of all questions which may arise as to the existence of the jurisdiction,— to reduce all special rules to one general formula. To this end, it has often been said by courts as well as by text-writers that the equity jurisdiction extends to and embraces all civil cases, and none others, in which there is not a full, adequate, and complete remedy at law.[1] As has already been stated, some writers have gone so far as to assert that equity jurisprudence consists wholly in a system of remedies, and that the only rights created and conferred by it are remedial rights, that is, rights to obtain some remedy; and according to their theory, its jurisdiction is of course to be measured by the absence or existence of adequate remedies at the law.[2]

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[1] See, as illustrations, the following among many such cases: Earl of Oxford's Case, 1 Ch. Rep. 1, 2 Lead. Cas. Eq. 1291, and notes; Grand Chute v. Winegar, 15 Wall. 373; Insurance Co. v. Bailey, 13 Wall. 616; Hipp v. Babin, 19 How. 271, 278; Parker v. Winnipiseogee Lake, etc., Co., 2 Black, 545, 550, 551.

[2] See Adams's Equity, Introduction, p. 9, 6th Am. ed. Mr. Adams says: Equity "does not create rights which the common law denies; but it gives effectual redress for the infringement of *existing* rights, where, by reason of the special circumstances of the case, the redress at law would be inadequate." See also Introd., p. 12: Now, if equity "gives effectual redress for the infringement of *existing* rights" (and the whole passage shows that he is speaking of existing *primary* rights), it is plain that the "existing rights" thus infringed upon and redressed must have drawn their existence from *some source*, either from the law or from equity. It is absolutely certain that

§ 133. The general criterion which has thus been proposed is, however, insufficient and misleading. Although the inadequacy of legal remedies explains, and is even necessary to explain, the interposition of equity in certain classes of cases, it wholly fails to account in any consistent and correct manner for the entire equity jurisdiction. The history of the court of chancery shows that all its powers cannot be referred to this source. It is true that the common-law modes of procedure are utterly inadequate to meet all the ends of justice, and to administer all the remedies which are granted by equity; and that in some general sense equity is established to supply this defect in the law. But the absence of full, adequate, and complete remedies at law does not constitute a basis upon which to rest the whole equity jurisdiction, nor furnish a practical explanation of all the doctrines and rules which make up the equity jurisprudence. No theory is scientifically complete, nor practically efficient, which does not recognize two distinct sources and objects of the equity jurisdiction, namely, the primary rights, estates, and interests which equity juris-

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many of the "existing rights" which are thus redressed by equity, even if not denied by the law, *are neither created nor recognized by the law.* Whence, for example, do the rights of the *cestui que trust* of land arise? Such rights "exist," and when infringed upon they are "effectually redressed" by equity. Rights cannot exist without some creative source from which they derived their efficacy. The law certainly does not create, nor even acknowledge, the existence of any rights belonging to the *cestui que trust.* The conclusion is inevitable that these rights are created by equity. Even Mr. Adams admits the existence of these primary rights independent of the remedies for their violation; and to deny that they are created by equity is to run into a palpable absurdity for the purpose of maintaining an untenable theory. If it should be said, in opposition to this conclusion, that the only rights which the law does not itself create nor recognize are the very remedial rights themselves given by equity, the rights to obtain the remedies furnished by the equity methods, the answer is very simple. In the first place, this argument is a mere begging of the question, a mere reasoning in a circle; and in the second place, the statement is without any foundation in fact. There are large and numerous classes of rights, estates, and interests maintained and enforced by equity, but not recognized by the law, which are in every sense of the term primary,— as much so as the legal estate in fee in land; and some of these equitable primary rights are, in truth, not merely unrecognized, but actually denied by the law.

prudence creates and protects, and the remedies which it confers. These two facts in combination can alone define the extent and fix the limits of the equity jurisdiction.[1]

§ 134. Some writers have argued that the equitable jurisdiction is to be regarded as wholly remedial, and that equity itself does not create any rights of property or other primary rights, because the court of chancery, as they say, only acts *in personam* against the parties, and never *in rem* upon the subject-matter of a judicial controversy. It is said that a decree of the court never operates by virtue of its own inherent efficacy to create or to transfer an estate, right, or interest; that such decree never executes itself, nor furnishes any means or instruments by which it may be executed without the intervention and act of the party against whom it is rendered; that the plaintiff in equity never, merely by means of the decree in his favor, either recovers possession of the land or other subject-matter, or becomes vested with a title to or estate therein; and that the court simply orders some act to be done, a conveyance to be executed, an instrument to be surrendered up and canceled, possession to be delivered, and the like, and then merely uses a moral coercion upon the defendant, by means of fine and imprisonment, to compel *him* to do what is directed to be done in the judgment. This radical difference between the effect of a decree in equity and a judgment at law, it is urged, shows that there are no equitable primary rights, no equitable estates or interests, distinct and separate from the rights to obtain such remedies as are administered by the court of chancery.

§ 135. There may be some plausibility in this argument on its surface, but when it is examined with care, and under the light of history, all its force disappears. The early chancellors, from prudential motives alone, and to avoid a direct conflict with the common-law courts, adopted this method of acting, as they said, upon the consciences of defendants; and the practice which they invented has, with the English national devotion to established forms, continued to modern times. But it is certainly a complete confounding of the essential fact with the external form, to say that such a mere method of procedure, adopted solely from considerations of policy, determines the nature of the equitable jurisdiction, and demonstrates the non-existence of any equitable primary rights, estates, and interests. If there had been any *necessary* connection between the proceedings and remedies of chancery and this mode of enforcing its decrees *in personam,* if it had been intrinsically *impossible* to render these decrees operative *in rem,* then the argument would have had some weight; but in fact there is no such connection, no such impossibility; the decrees of a court of equity may be made to operate *in rem* to the same extent and in the same manner as judgments at law. Furthermore, whatever of plausibility there might be in the theory as applied to the English court of chancery has been entirely destroyed by the legislation of this country. The statutes of the several states have virtually abolished the ancient doctrine that the decrees in equity can only act upon the person of a party, and have generally provided that in all cases where the ends of justice require such an effect, and where it is possible, a decree shall either operate *ex proprio vigore* to create, transfer, or vest the intended right, title, estate, or interest, or else that the acts required to be done in order to accomplish the object of the decree shall be performed by an officer of the court acting for and in the name of the party against whom the adjudication is made. In the vast variety of equitable remedies, there are, of course, some which directly affect the person of the defendant, and require some *personal* act or omission on his part, and these are still enforced, and can only be enforced, *in personam*. In regard to all other classes, the statutes of our states have, as a general rule, either made them operative *per se* as a source of title, or as conferring an estate or right, or have given the requisite power to certain officers to carry them into effect.[1] This modern legislation has not, however, deprived a court of equity of its power to act *in personam* in cases where such an effect is necessary to maintain its settled jurisdiction; as, for example, where the parties being within its jurisdiction, the subject-matter of the controversy, whether real or personal property, is situated within the territory of another state or nation.[2] [a]

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[1] The correctness of this view of the equitable jurisdiction and of equity jurisprudence is acknowledged and asserted by the most able and learned among modern text-writers. Mr. Spence, in particular, though using a terminology somewhat different from that which I have adopted, makes this theory the basis of his classification and of his whole treatment of equity jurisprudence.

§ 136. **Divisions.**— Adopting, therefore, the primary rights, estates, and interests which equity creates, and the remedies which it confers, as the objects which define and limit the extent of the equity jurisdiction, I shall state the principles by which the extent and limits of that jurisdiction are ascertained. It has been customary among writers to distinguish the equitable jurisdiction as *exclusive* and *concurrent*, and some have added the third subdivision, *auxiliary*. I have already given reasons which appear to be sufficient for not following this method of division in treating of the matters which constitute the body of equity jurisprudence; but I shall adopt it as the most convenient in discussing the jurisdiction. This distinction or opposition between the "exclusive" and the "concurrent" relates wholly to the nature and form of the remedies which are administered by equity courts, and properly belongs, therefore, to that part of the jurisdiction alone which is based upon these remedies. As has already been stated, the equity jurisdiction embraces both cases for the maintenance or protection of primary rights, estates, and interests purely equitable, and cases for the maintenance or protection of primary rights, estates, and interests purely legal; and in the latter class of cases the remedies granted may be of a kind which are peculiar to equity courts, such as reformation, cancellation, injunction, and others, or may be of a kind which are administered by courts of law, as the recovery of money, or of the possession of specific things. It is evident that the distinction between the exclusive and the concurrent jurisdiction represents the fact that the two kinds of remedies, equitable and legal, may, under proper circumstances, be obtained in the last-mentioned class of cases; no such division could have existed if the equity jurisdiction had been confined to the first class.

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[1] For example, wherever a decree orders a conveyance to be made by the defendant, the statutes of many states provide that the deed may be executed by a commissioner or other officer of the court, with the same effect as though done by the defendant himself; others declare that decrees may vest a title in the party in whose favor they are rendered. All decrees which require the sale of property real or personal, or the distribution of moneys, are executed by an officer of the court, and his deed upon the sale conveys all the estate and title of the defendant. Preventive decrees, like ordinary injunctions, and some kinds of restorative decrees, as mandatory injunctions, must still operate *in personam*, and be enforced by attachment process against the defendant, with fine and imprisonment in case of disobedience.

[2] See Topp v. White, 12 Heisk. 165; Moore v. Jaeger, 2 McAr. 465; Penn v. Lord Baltimore, 1 Ves. Sen. 444, 2 Lead. Cas. Eq., and notes thereto; Caldwell v. Carrington, 9 Pet. 86; Watkins v. Holman, 16 Pet. 25; Mead v. Merritt, 2 Paige, 402; Hawley v. James, 7 Paige, 213, 32 Am. Dec. 623; Sutphen v. Fowler, 9 Paige, 280; Newton v. Bronson, 13 N. Y. 587, 67 Am. Dec. 89; Bailey v. Ryder, 10 N. Y. 363; Gardner v. Ogden, 22 N. Y. 332-339, 78 Am. Dec. 192; Pingree v. Coffin, 12 Gray, 304; Davis v. Parker, 14 Allen, 94; Brown v. Desmond, 100 Mass. 267.

(a) The text is cited in Bethell v. Bethell, 92 Ind. 318 (suit to reform a deed).

§ 137. **Exclusive Jurisdiction.**— With these preliminary explanations we are prepared for a description, in general terms, of the various kinds and classes of cases which come within the equitable jurisdiction of courts. The exclusive jurisdiction extends to and embraces, *first,* all civil cases in which the primary right violated or to be declared, maintained, or enforced — whether such right be an estate, title, or interest in property, or a lien on property, or a thing in action arising out of contract — is purely equitable, and not legal, a right, estate, title, or interest created by equity, and not by law.[1] All cases of this kind fall under the equitable jurisdiction alone, because of the nature of the primary or substantive right to be redressed, maintained, or enforced, and not because of the nature of the remedies to be granted; although in most of such instances the remedy is also equitable. It is a proposition of universal application that courts of law never take cognizance of cases in which the primary right, estate, or interest to be maintained, or the violation of which is sought to be redressed, is purely equitable, unless such power has been expressly conferred by statute; and if the statutes have interfered and made the right or the violation of it cognizable by courts of law, such right thereby becomes to that extent legal.[2] One example will sufficiently illustrate this proposition. At the common law (in its earliest stages), an assignment of a thing in action conveyed no right or interest whatever to the assignee which would be recognized to any extent or for any purpose by a court of law. In process of time, however, an *interest* in the assignee came to be acknowledged, and to be in some measure protected; but he was never regarded as obtaining a full legal right or title, so that he could maintain an action in his own name as assignee of the thing in action.[3] Equity, however, treated the assignee as succeeding to all the right and title of the assignor, as possessing a full interest in, or, so to speak, ownership of, the thing in action transferred, and therefore permitted him to maintain the proper suit in his own name. It is an entirely mistaken view to say that equity only gave a remedy in this case, for there could be no remedy without an antecedent right. The assignee acquired a substantive right, an absolute interest; but it was equitable, and could therefore only be enforced by a suit in equity; while a court of law would only permit an action to be prosecuted in the name of the assignor, in whom it said the title was still vested.[4] The statutes of many states have abolished this common-law rule, and enabled the assignee to sue in his own name in a court of law. The necessary effect of this legislation is to change the right acquired by the assignee of a thing in action, from being purely equitable, into a legal title, interest, or ownership.[5] [a]

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[1] See 1 Spence's Eq. Jur., pp. 430–434.

[2] For example, by a peculiar rule in Georgia, a person who has a high equitable estate in land, called a "complete equity," may maintain the legal action of ejectment on it to recover possession of the land: Goodson v. Beacham, 24 Ga. 153; Jordan v. Faircloth, 27 Ga. 372, 376. A vendee in a contract for the sale of land who had paid the agreed price, and was entitled to a deed and to the possession, and who simply needed the legal title to complete his ownership, would have the "complete equity" intended by this rule. In my own opinion, the same result *should* follow in all the states which have adopted the reformed procedure abolishing all distinctions between legal and equitable actions; but the decisions are nearly all opposed to this view. See the question stated and discussed in Pomeroy on Remedies and Remedial Rights, §§ 98–103.

[3] 2 Black. Com. 442; 1 Spence's Eq. Jur., p. 181; Lampet's Case, 10 Coke, 47, 48; Winch v. Keeley, 1 Term Rep. 619; Master v. Miller, 4 Term Rep. 340; Westoby v. Day, 2 El. & B. 605, 624; Raymond v. Squire, 11 Johns. 47; Briggs v. Dorr, 19 Johns. 95; Conover v. Cutting, 50 N. H. 47.

§ 138. The exclusive jurisdiction includes, *secondly*, all civil cases in which the remedy to be granted — and, of course, the remedial right — is purely equitable, or one which is recognized and administered by courts of equity, and not by courts of law. In the cases of this class, the primary right which is maintained, redressed, or enforced is sometimes equitable and is sometimes legal; but the jurisdiction depends, not upon the nature of these rights, estates, or interests, but wholly upon the nature of the remedies.[a] Cases in which the remedy sought and obtained is one which equity courts alone are able to confer must, upon any consistent system of classification, belong to the *exclusive* jurisdiction of equity, even though the primary right, estate, or interest of the party is one which courts of law recognize, and for the violation of which they give *some* remedy. Thus a suit to compel the specific performance of a contract falls under the exclusive jurisdiction of equity, although a legal right also arises from the contract, and courts of law will give the remedy of damages for its violation. The remedies peculiar to equity are not confined to cases in which the primary right of the complaining party, whatever be its kind, is equitable; they are given in numerous classes of instances where such right, estate, or interest is wholly legal. Thus a legal estate in land may be protected by the exclusively equitable remedy of injunction against nuisances or continued trespasses; or the legal estate may be established against adverse claimants by a suit to quiet title, or by the remedy of cancellation to remove a cloud from title. Again, the particular fact or event which occasions the peculiar equitable remedy, and gives rise to the right to such remedy, may also be the occasion of a legal remedy and a legal remedial right simultaneous with the equitable one. This is especially true with reference to fraud, mistake, and accident. Fraud, for example, may at the same time be the occasion of the legal remedy of damages and of the equitable relief of cancellation. These two classes of cases cannot, however, be regarded or treated as belonging to the concurrent jurisdiction; such a mode of classification could only be productive of confusion. The criterion which I have given is always simple and certain in referring to the exclusive jurisdiction

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[4] 1 Spence's Eq. Jur., p. 643; Row v. Dawson, 1 Ves. Sen. 331, 2 Lead. Eq. 1531, 1559, and notes thereto.

[5] See, as to these state statutes and their effect, Pomeroy on Remedies and Remedial Rights, chap. 2, sec. 2, §§ 124–138; Petersen v. Chemical Bank, 32 N. Y. 21, 35, 88 Am. Dec. 298, per Denio, J.: "The law of maintenance prohibited the transfer of the *legal* property in a *chose in action*, so as to give the assignee a right of action in his own name. But this is now abrogated, and such a demand as that asserted against the defendant in this suit [an ordinary debt] may be sold and conveyed, so as to vest in the purchaser *all the legal* as well as the equitable rights of the original creditor." See also Cummings v. Morris, 25 N. Y. 625, 627, per Allen, J. Some *dicta* of judges to the contrary, to be found in a few cases, must be regarded as mistaken; as, for example, McDonald v. Kneeland, 5 Minn. 352, 365, per Atwater, J.

(a) This paragraph of the text is cited in Deering v. Schreyer, 171 N. Y. 451, 64 N. E. 179.

(a) The text is quoted in Montana Ore Purchasing Co. v. Boston & M. Consol. C. & S. Min. Co., 27 Mont. 536, 70 Pac. 1114, 71 Pac. 1005, an action to quiet title.

all cases in which the remedy is given by courts of equity alone, without regard to the nature of the substantive right which forms the basis of the action, or to the fact or event which is the occasion of the required relief. In this manner only is the notion of *jurisdiction* preserved distinct from all questions as to the propriety of exercising that jurisdiction and of granting relief by equity courts in particular cases. It is proper to remark here that the statutory legislation of many states has increased the number of cases in which purely equitable remedies are granted for the purpose of maintaining, enforcing, or defending primary rights, estates, and interests which are legal in their nature, and has thus enlarged this department of the original exclusive jurisdiction of equity. As examples merely, I mention the statutory suit to quiet title and determine the legal estate by the holder of the fee in possession or not in possession, against an adverse claimant or claimants relying perhaps upon another legal title;[b] the suit by heirs to set aside an alleged will of lands; the ordinary equitable suit in many states to enforce a mechanic's lien and other similar liens; and the suits given by statute in most states to dissolve corporations or to remove their officers, and the like.

§ 139. **Concurrent Jurisdiction.**— The concurrent jurisdiction embraces all those civil cases in which the primary right, estate, or interest of the complaining party sought to be maintained, enforced, or redressed is one which is cognizable by the law, and in which the remedy conferred is of the same kind as that administered, under the like circumstances, by the courts of law,— being ordinarily a recovery of money in some form.[1] The primary right, the estate, title, or interest, which is the foundation of the suit, must be legal, or else the case would belong to the exclusive jurisdiction of equity; and the law must, through its judicial procedure, give *some* remedy of the same general nature as that given by equity, but this legal remedy is not, under the circumstances, full, adequate, and complete. The fact that the legal remedy is not full, adequate, and complete is, therefore, the real foundation of this *concurrent* branch of the equity jurisdiction.[2] [a] This principle is well illustrated by the case of contribution among sureties. The surety entitled to reimbursement may maintain an action at law, and recover a pecuniary judgment against each of the persons liable to contribution, but this legal relief is subject to so many limitations that it may often fail to restore the plaintiff to his rightful position. The equity suit for a contribution gives exactly the same final remedy,— a recovery of money; but on account of the greater freedom and adaptability to circumstances incident to the equitable procedure, it enables the plaintiff in one proceeding to obtain such complete reimbursement as relieves him effectually from all the burden which does not properly rest upon him, and produces a just equality of recompense as well as of loss among all the parties.[3] The incidents and features of legal remedies which render them inadequate are various in their kind and extent, and will be described in a subsequent section. One of the most common and important of these features which is frequently the ground for the equitable jurisdiction is the necessity of obtaining whatever remedies the law furnishes, by means of several separate actions, either simultaneous against different persons, or successive against the same person; while in equity the plaintiff may obtain full relief by one suit brought against all the parties liable or interested. This power, which the equity courts possess, of deciding the whole matter in one judicial proceeding, and of thus avoiding a repetition or circuity of legal actions, is a fruitful source of the concurrent equitable jurisdiction.[4] [b]

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[1] See 1 Spence's Eq. Jur., pp. 430-434.

(b) The text is quoted and cited in Montana Ore Purch. Co. v. Boston & M. Consol. C. & S. Min. Co., 27 Mont. 536, 70 Pac. 1114, 71 Pac. 1005, discussing the equitable jurisdiction in such suits as dependent on the plaintiff's possession. See, on this subject, *post*, § 292, editor's note; and Pomeroy's Equitable Remedies, chapter "Quieting Title."

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[2] There is a distinction here of great importance, but which has often been overlooked. The want of a full, adequate, and complete remedy at law, under the circumstances of the particular case, is also the reason why the jurisdiction of equity is actually *exercised*, and a decision is made in favor of the plaintiff granting him equitable relief, in some instances of the *exclusive* jurisdiction; as, for example, in suits for the specific performance of contracts. But such fact is not in these instances the foundation of the *jurisdiction;* it is only the occasion on which a decision is rightfully made in pursuance of the doctrines of equity jurisprudence by courts already possessing the jurisdiction. The jurisdiction exists because courts of equity alone are competent to administer these remedies. In all instances of *concurrent* jurisdiction, both the courts of law and those of equity *are* competent to administer the same remedy, and the foundation of the *jurisdiction* in equity is the inadequacy of the relief as it is administered through means of the legal procedure. The *exclusive* jurisdiction of equity rests upon an entirely different foundation, and exists absolutely without reference to the adequacy of legal reliefs. This distinction is a plain one, but is often lost sight of; the two classes of cases are often confounded, and the equitable *jurisdiction*, in all instances exclusive and concurrent, is made to rest merely upon the inadequacy of legal remedies. This error grows out of the tendency to confound questions as to the equitable *jurisdiction;* i. e., the power of equity courts to hear and decide, with the altogether different questions as to the rightfulness of their decision; i. e., whether, according to the doctrines of equity, a case unquestionably within their jurisdiction was properly decided.

(a) The text is cited in Henderson v. Johns, 13 Colo. 280, 22 Pac. 461 (suit to compel surrender of notes); and quoted in Myers v. Sierra Valley Stock & Agric. Assn., 122 Cal. 669, 55 Pac. 689 (remedy to enforce contribution among stockholders is at law); Buck v. Ward, 97 Va. 209, 33 S. E. 513 (suit to recover money expended by reason of defendant's fraud).

§ 140. The cases included within the concurrent jurisdiction may, for purposes of convenience and clearness in their discussion, be arranged under two general classes. The *first* contains all those cases, belonging to the concurrent jurisdiction, in which the primary right violated, the estate, title, or interest to be protected, is, of course, legal, and the subject-matter of the suit, and the act, event, or fact which *occasions* the right to a remedy, *may* be brought within the cognizance of the law courts, and made the foundation of a legal action, but in respect of which the whole system of legal remedies is so partial and insufficient that complete justice can only be done by means of the equity jurisdiction. The most important acts, events, and facts which thus require or permit the interposition of equity in the cases forming this branch of the concurrent jurisdiction are fraud, mistake, and accident.[1] [a] The second class contains all the remaining cases in which the primary right to be redressed or protected is legal, and the relief is of the same kind as that given by the law, but in which, from the special circumstances of the case itself, or from the inherent defects of the legal procedure, the remedy at law is inadequate, and equity takes jurisdiction, in order to do complete justice. Among the familiar examples of this class are suits for an accounting,[b] for contribution, for exoneration, in all of which the remedy, both at law and in equity, is a recovery of money; suits for partition of land,[c] admeasurement of dower, and settlement of boundaries, in all of which the final relief, both at law and in equity, is the obtaining possession of specific tracts of land; and suits which result in an award of damages.

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[3] Dering v. Earl of Winchelsea, 1 Cox, 218, 1 Lead. Cas. Eq. 120, and notes.

[4] New York, etc., R. R. v. Schuyler, 17 N. Y. 592; McHenry v. Hazard, 45 N. Y. 580; Third Ave. R. R. v. Mayor, etc., 54 N. Y. 159; Eldridge v. Hill, 2 Johns. Ch. 281; West v. Mayor, etc., 10 Paige, 539; Oelrichs v. Spain, 15 Wall. 211, 228; Woods v. Monroe, 17 Mich. 238; Earl of Oxford's Case, 2 Lead. Cas. Eq. 1337, note.

(b) The text is cited in McMullin's Admr. v. Sandars, 79 Va. 356. See *post*, §§ 243–275.

§ 141. It should be remarked, however, that the foregoing divisions of the jurisdiction cannot always be strictly observed in the actual practice, since one suit may often include different kinds of the same jurisdiction, and may even embrace both the exclusive and the concurrent jurisdictions. For example, both the equitable estate of the *cestui que trust* and the legal estate of the trustee may be protected by means of one action based upon the exclusive jurisdiction, and many remedies belonging to the exclusive jurisdiction are combined in the same suit with a pecuniary recovery. The explanation is to be found in the general principle of the equity procedure, which requires all the parties interested in the subject of an action to be brought before the court, and the whole controversy to be settled by one adjudication.

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[1] All cases of equitable cognizance arising from fraud, accident, or mistake do not belong to the concurrent jurisdiction merely because the law has jurisdiction of cases arising from the same facts. Suits occasioned by fraud, in which the remedy granted is cancellation, and those occasioned by mistake, in which the remedy is a reformation, and the like, fall within the exclusive jurisdiction. The concurrent jurisdiction, however, embraces a large variety of cases in which the cause of action springs from, or is occasioned by, fraud or mistake.

(a) This paragraph of the text is cited in Stockton v. Anderson, 40 N. J. Eq. 486, 4 Atl. 642.

(b) This paragraph of the text is cited in Russell v. McCall, 141 N. Y. 437, 38 Am. St. Rep. 807.

(c) This paragraph of the text is cited in Daniels v. Benedict, 50 Fed. 347.

§ 142. **Auxiliary Jurisdiction.**— The auxiliary jurisdiction, in its original and true scope and meaning, is in fact a special case of the "exclusive," since its methods and objects are confined to the equity procedure. In all suits which belong to this jurisdiction in its original and proper sense, no remedy is either asked or granted; their sole object is the obtaining or preserving of evidence to be used upon the trial of some action at law. The cases embraced within this proper auxiliary jurisdiction are suits for discovery, to obtain an answer under oath from a party to a pending or anticipated action at law, which answer may be used as evidence on the trial of such action; suits for the perpetuation of evidence; and suits for the obtaining of evidence in a foreign country. The latter two species of suits are practically obsolete in this country, having been superseded by more summary and efficient proceedings authorized by statutes.[a]

§ 143. Although the auxiliary jurisdiction for a discovery was originally exercised for the sole purpose above mentioned, to obtain evidence from a party litigant to be offered on the trial of a legal action, so that as soon as its purpose was accomplished by the filing of a proper answer the suit itself was ended, and no decree was possible, yet

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(a) This paragraph of the text is cited in Turnbull v. Crick, 63 Minn. 91, 65 N. W. 135; Chapman v. Lee, 45 Ohio St. 356, 13 N. E. 736.

in some of the American states such a discovery in relation to matters in controversy purely legal has been made the ground of enlarging the *concurrent* jurisdiction of equity, by extending it to the very issues themselves in respect of which the discovery is obtained. In other words, where the court of equity has exercised its auxiliary jurisdiction to obtain discovery concerning any matter in controversy, even though purely legal, it thereby acquires complete jurisdiction over the controversy itself, and may go on and decide the issues and grant the proper relief, although the case is one cognizable at law, and the legal remedy is *fully adequate.* Mere discovery is thus made the foundation of a concurrent jurisdiction over cases which are purely legal, both in the primary rights involved and in the remedy, without any regard to the adequacy or inadequacy of this legal remedy. This doctrine prevails, or has prevailed, in certain of the states, but it is clearly opposed to the true theory of the equitable jurisdiction.[1] It should be remarked that in many of the states the whole auxiliary jurisdiction for discovery has become useless and obsolete, through great changes made in the general law of evidence, or has been expressly abolished by statute.[2]

§ 144. The suit for a "discovery" belonging to the auxiliary jurisdiction, as described in the foregoing paragraphs, should be carefully distinguished from the so-called "discovery" which may be, and ordinarily is, an incident of every equitable action. It is a part of the ordinary equity procedure, that whatever be the relief sought, and whether the jurisdiction be exclusive or concurrent, the plaintiff may, by means of allegations and interrogatories contained in his pleading, compel the defendant to disclose by his answer facts within his own personal knowledge which may operate as evidence to sustain the plaintiff's contention. The name "discovery" is also given to this process of probing the defendant's conscience, and of obtaining admissions from him, which accompanies almost every suit in equity; but it should not be confounded with "discovery" in its original and strict signification, nor with that mentioned in the last preceding paragraph, which is sometimes made the ground for extending the concurrent jurisdiction of equity over cases otherwise belonging to the domain of the common-law courts.

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[1] See *post*, chap. ii, §§ 250 et seq.

[2] See *post*, section iv.

§ 145. The foregoing summary may be appropriately concluded by a statement of the order to be pursued in the further discussion of the equitable jurisdiction thus briefly outlined. The whole subject will be distributed into three chapters, which will respectively treat of,— Chapter I., doctrines concerning the jurisdiction generally, its extent when unaffected by statutory limitations; Chapter II., general rules for the government of this jurisdiction; Chapter III., particular jurisdiction of the courts in the various states, and of the United States courts. The three remaining sections of the present chapter are devoted in order to a more detailed description of the exclusive, the concurrent, and the auxiliary jurisdictions.

SECTION II.

THE EXCLUSIVE JURISDICTION.

ANALYSIS.

§ 146. Equitable primary rights and "equities" defined.
§§ 147–149. Equitable estates described.
§ 150. Certain distinctive equitable doctrines forming part of equity jurisprudence.
§§ 151–155. Trusts described.
§ 156. Executors and administrators.
§§ 157, 158. Fiduciary relations.
§§ 159, 160. Married women's separate property.
§ 161. Estates arising from equitable conversion.
§§ 162, 163. Mortgages of land.
§ 164. Mortgages of personal property.
§§ 165–167. Equitable liens.
§§ 168, 169. Estates arising from assignment of things in action, possibilities, etc., and from an equitable assignment of a fund.
§§ 170–172. Exclusive equitable remedies described.

§ 146. **Equitable Estates, Interests, and Rights in Property.**— It was stated in the preceding section that the exclusive jurisdiction included, *first,* all civil cases based upon or relating to equitable estates, interests, and rights in property as the subject-matter of the action, whatever may be the nature of the remedy; and *secondly,* all civil cases in which the remedy granted is purely equitable, that is, administered by courts of equity alone, whatever may be the nature of the primary right, estate, or interest involved in the action. I purpose now to describe these two classes in a general manner. Equitable primary rights, interests, and estates may exist in things real and in things personal, in lands and in chattels. They are also of various amounts and degrees, from the substantial beneficial ownership of the subject-matter down to mere liens. In all cases, however, they are rights in, to, or over the subject-matter, recognized and protected by equity, and are to be distinguished from the so-called "equities," a term which, when properly used, denotes simply the right to some remedy administered by courts of equity.[1] [a] A *cestui que trust,* a mortgagee, a vendee in a contract for the sale of land, is clothed with an equitable estate or interest; while the *mere* right to have an instrument reformed or canceled, or to have a security marshaled, and the like, is properly "an equity."

§ 147. **Equitable Estate Defined.**— An equitable *estate,* in its very conception, and as a fact, requires the simultaneous existence of two estates or ownerships in the same subject-matter, whether that be real or personal,— the one legal, vested in one person, and recognized only by courts of law; the second equitable, vested in another person, and recognized only by courts of equity. These two interests must be separate, and as a rule, must be held by different persons; for if the legal estate and the equitable estate both become vested in the same person by the same right, then, as a general rule, a merger takes place, and the legal estate alone remains.[1] There are indeed exceptions to this general doctrine; for under certain circumstances, as will appear hereafter, equity prevents such a merger, and keeps alive and distinct the two interests, although they have met in the same owner.[2] In all cases of equitable *estates*, as distinguished from lesser interests, whether in fee, for life, or for years, they are in equity what legal estates are in law; the ownership of the equitable estate is regarded by equity as the real ownership, and the legal estate is, as has been said, no more than the shadow always following the equitable estate, which is the substance, except where there is a purchaser for value and without notice who has acquired the legal estate.[3] [a] This principle of a double right, one legal and the other equitable, is not confined to equitable *estates*, properly so called; it is the essential characteristic of every kind of equitable interest inferior to estates. In the total ownership resulting from mortgages, or from the operation of the doctrine of conversion, or from the assignment of things in action, and other interests not assignable at law, and in liens, there is always a legal title or estate vested in one person, recognized by courts of law alone, and an equitable interest, ownership, or claim, distinct from a *mere* right of action or remedial right, vested in another person, which is recognized, and, according to its nature, protected or enforced by courts of equity.

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[1] The term "an equity" is thus synonymous with what I have denominated an equitable remedial right. It is, however, constantly used in a broader and improper sense, as describing every kind of right which equity jurisprudence recognizes,— estates and interests in land, or chattels, liens, and rights to obtain remedies. Such indiscriminate use of the term only tends to produce confusion of thought.

(a) This paragraph of the text is cited in Mengel v. Lehigh Coal & Nav. Co., 24 Pa. Co. Ct. Rep. 152.

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[1] Selby v. Alston, 3 Ves. 339.

[2] These apparent exceptions really confirm the general rule.

[3] Attorney-Gen. v. Downing, Wilm. 23; Burgess v. Wheate, 1 Eden, 223; Mansell v. Mansell, 2 P. Wms. 681; Williams v. Owens, 2 Ves. 603; Brydges v. Brydges, 3 Ves. 120. As to the descent of equitable *estates* as contradistinguished from mere equitable rights of action or "equities," see Trash v. Wood, 4 Mylne & C. 324, 328; Roberts v. Dixwell, 1 Atk. 609. For example of equitable estate in fee under the doctrine of conversion descending to heir, see Martin v. Trimmer, L. R. 11 Ch. Div. 341.

(a) This paragraph of the text is quoted in Patty v. Middleton, 82 Tex. 586, 17 S. W. 909, discussing the equitable estate of the wife in "community" property under the Texas law.

§ 148. Equitable estates and interests of all kinds are separated by a broad line of distinction, with respect to their nature and the mode in which equity deals with them, into two classes. The first class contains those in which the equitable estate is regarded as a permanent, subsisting ownership; the separation between the legal and equitable titles is not treated as an anomaly, much less a wrong, but as a fixed and necessary condition to be preserved as long as the equitable interest continues; and the various rules and doctrines of equity are concerned with the respective rights and liabilities of the two owners, while the remedies given to the equitable owner are intended to preserve his estate, and to protect it both against the legal owner and against third persons. The class embraces most species of express trusts, the interests created by mortgages as originally established by the court of chancery, the interests resulting from an assignment of things in action. These various species of equitable estates and interests might well be described by applying to them the term "permanent." In the second class the separation of the two interests is regarded as always temporary, and in many instances as actually wrongful. There is a certain antagonism between the equitable and the legal ownership or right, and the very existence of the legal estate is often in complete violation of the rights of the equitable owner. The doctrines and rules of equity concerning this class do not contemplate a permanent separation between the two interests; the rights of the equitable owner are hostile to those of the legal proprietor; while the remedies given to the equitable owner always have for their object the perfecting of his rights against the legal estate, and very generally consist in compelling a complete transfer of the legal estate, so that the equitable owner shall obtain the legal title in addition to the equitable interest which he already possesses. The class embraces resulting, implied, and constructive trusts, the interests arising from the operation of the doctrine of conversion, and liens, including the equitable interest of mortgagees according to the doctrine which prevails in many of the states. Equitable estates of the first class are very numerous in England, by reason of the customs of landed proprietors and the frequency of marriage settlements, provisions for families in wills, the separate property of married women, charitable foundations, and other species of express trusts; and a very large part of equity as administered in England is concerned with these permanent equitable estates. Although not unknown, they are, from our widely different social customs and practices of land-owners, comparatively very infrequent in this country.

§ 149. From the universality of this double ownership, or separation of the legal and equitable titles between two proprietors or holders, which is an essential feature of trusts, all species of equitable estates and interests might possibly be regarded as particular kinds of trusts, or as special applications of the general principles concerning trusts. Thus the holder of the legal title in assignments of things in action, in cases of conversion, in mortgages and in liens, no less than in trusts proper, is frequently spoken of as the trustee, and the holder of the equitable interest as the *cestui que trust.* It would be possible, therefore, to treat the entire jurisdiction of equity over equitable estates and interests, and these estates and interests themselves, as based upon and included within the single subject of trusts.[1] But this method, while resting upon some analogies and external resemblances, would overlook essential differences between the various estates and interests created by equity, and would therefore be misleading. Still, as this form of a double ownership or right originated in the notion of trusts, and as all the species of equitable interests are connected by analogy, more or less closely, with trusts, it becomes necessary to explain the essential nature of trusts, and to describe the introduction and development of their conception with some detail.

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[1] This method has been pursued partially, if not wholly, by some text-writers: See Willard's Eq. Jur.

§ 150. I would remark, in this connection, so as to prevent misunderstanding, that there are many important and even fundamental principles and doctrines which are applied in all parts of the equity jurisprudence, but which do not belong to a statement of its jurisdiction. These doctrines do not determine the *existence* of equitable estates and interests, nor fix the *form* and *nature* of equitable remedies; but they aid in defining and regulating the rights, duties, and liabilities incident to such estates and interests, and furnish rules concerning their enjoyment, transfer, devolution, and the like; and they also serve to determine the occasions on which rights of action arise, the extent to which parties are entitled to remedies, and the kind of remedy appropriate to secure or restore the primary right invaded. Among these important principles and doctrines of equity I mention, as illustrations, the rules established for the construction of wills and deeds; the principles which are especially concerned with the administration of estates, and the settlement of the claims of creditors, encumbrancers, devisees, legatees, and others, upon funds belonging to the same debtor, including the doctrines of equitable and legal assets, of contribution and exoneration, of marshaling assets and securities, of election, of satisfaction and performance, of priorities, and of notice; and other principles of equal importance, the equitable position of *bona fide* purchasers, the theory of valuable and meritorious consideration, the appropriation of payments and the apportionment of liabilities, the relations between sureties and their creditors and the principal debtors, the control of transactions between persons in fiduciary relations, the equitable theory as to forfeitures and penalties, and the general doctrines concerning fraud, mistake, accident, public policy, and the like. These and other fundamental principles and doctrines are invoked and applied throughout every branch of equity jurisprudence; they aid, to a greater or less extent, in controlling every species of equitable primary right, estate, or interest, and in regulating every kind of remedial right and remedy recognized by courts of equity. While they form no part of the *jurisdiction,* properly so called, they constitute a most important feature of the equity jurisprudence, and will be discussed under their appropriate connections in subsequent chapters. The purely equitable estates and interests which come within the exclusive jurisdiction and constitute the first branch thereof are the following, separated, for purposes of convenience as to treatment, into general groups: Trusts; married women's separate property; equitable interests arising from the operation of the doctrine of conversion; equitable estates or interests arising from mortgages of real or of personal property, and from pledges of chattels or securities; equitable liens on real and on personal property; equitable interests of assignees arising from assignments of things in action, possibilities, and the like, not assignable at law, or arising from transactions which do not at law operate as assignments.[1] I shall describe with only so much detail as is necessary each one of these groups in order.

§ 151. **Trusts.**— The whole theory of trusts, which forms so large a part of the equity jurisprudence, and which is, in a comprehensive view, the foundation of all equitable estates and interests, has undoubtedly been developed from its germ existing in the Roman law, a peculiar mode of disposing of property by testament called the "*fidei-commissum.*" In a *fidei-commissum* the testator gave his estate directly to his heir, but accompanied the bequest with a direction or request that the heir should, on succeeding to the inheritance, at once transfer it to a specified beneficiary. At first the claims of the beneficiary were purely moral, resting wholly upon the good faith of the heir; but in process of time they became vested rights, recognized by the law and enforced by the magistrates.[1] Borrowed from this Roman conception, "uses," by which land was conveyed to or held by A to the use or for the benefit of B, seem to have been invented during the latter part of the reign of Edward III.[2] They grew rapidly into favor, and it is said that during the reign of Henry V. the greater part of the land in England was held in this manner. The "trusts," however, of modern equity jurisprudence are all *directly* based upon the celebrated "Statute of Uses," passed in the twenty-seventh year of the reign of Henry VIII. (A. D. 1535), although the principal doctrines which define their kinds and classes and regulate their operation may be traced to the uses existing prior to the statute. Henry VIII., in compelling Parliament to enact the statute of uses, undoubtedly intended to destroy the entire system of conveyances to uses, by which the legal and equitable estates in land were separated, and vested in different owners, and which, for many reasons, he regarded as a fraud upon his legal rights and prerogatives; but in fact no such result followed. From the peculiar language of the enacting clause, and by the judicial interpretation placed thereon, all the various kinds of double ownership which had before existed under the name of "uses" were preserved under the name of "trusts." The whole system fell within the exclusive jurisdiction of chancery; the doctrine of trusts became and continues to be the most efficient instrument in the hands of a chancellor for maintaining justice, good faith, and good conscience; and it has been extended so as to embrace not only lands, but chattels, funds of every kind, things in action, and moneys. I shall merely state, without describing in this part of my work, the various kinds and classes of trusts which are thus subject to the exclusive equitable jurisdiction.

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[1] See 1 Spence's Eq. Jur. 429–434, 435–593, 594–598, 599–604, 642. To these might be added, as an example of equitable primary rights not being estates or interests in nor liens on specific property, the right in equity of a creditor against the personal representatives of a deceased joint debtor, although his right is wholly gone at law; and the similar right of the personal representatives of a deceased joint creditor.

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[1] See Institutes of Justinian, b. ii, tit. 23, § 1; Sandars's ed., pp. 237, 238; Institutes of Gaius, ii., §§ 246–259.

[2] 1 Spence's Eq. Jur. 439–442.

§ 152. All possible trusts, whether of real or personal property, are separated by an important line of division into two great classes: those created by the intentional act of some party having the dominion over the property, done with a view to the creation of a trust, which are express trusts; those created by operation of law, where the acts of the parties may have had no intentional reference to the existence of any trust, which are implied trusts. Express trusts are again separated into two general classes: private and public. Private trusts are those created by some written instrument, deed, or will, or in some trusts of personal property by a mere *verbal* declaration, without any writing, for the benefit of certain and designated individuals, in which the *cestui que trust,* or "beneficiary," is a known and certain person or class of persons. Public, or as they are frequently termed, charitable, trusts are those created for the benefit of an unascertained, or uncertain, and sometimes fluctating body of individuals, in which the *cestuis que trustent* may be a class or portion of a public community, as, for example, the poor of a particular town or parish.

§ 153. Express private trusts are either "passive" or "active." An express private *passive* trust exists where land is conveyed to or held by A in trust for B, without any power expressly or impliedly given to A to take the actual possession of the land, or to exercise acts of ownership over it, except by the direction of B. The naked legal title only is vested in A, while the equitable estate of the *cestui que trust* is to all intents the beneficial ownership, virtually equivalent in equity to the corresponding legal estate.[1] Express private *active,* or as they are sometimes called, special, trusts are those in which, either from the express directions of the written instrument declaring the trust, or from the express verbal directions, when the trust is not declared in writing, or from the very nature of the trust itself, the trustees are charged with the performance of active and substantial duties in respect to the management of and dealing with the trust property, for the benefit of the *cestuis que trustent.* They may, except where restricted by statute, be created for every purpose not unlawful, and as a general rule, may extend to every kind of property, real and personal. In this class, the interest of the trustee is not a mere naked legal title, and that of the *cestui que trust* is not the real ownership of the subject-matter. The trustee is generally entitled to the possession and management of the property, and to the receipt of its rents and profits, and often has, from the very nature of the trust, an authority to sell or otherwise dispose of it. The interest of the beneficiary is more limited than in passive trusts, and in many instances cannot with accuracy be called even an equitable *estate.* He always has the right, however, to compel a performance of the trust according to its terms and intent.[2] The foregoing classes of express private trusts are all embraced within the general exclusive jurisdiction of equity as it is established by the English court of chancery; and they belong to the same jurisdiction as it is administered in the states of this country, except so far as they have been abrogated or modified by statute. In some of the states the legislature has not interfered, so that all these species of private trusts have a theoretical, even if not an actual, existence. In several of the states, however, great changes have been made by statute. By the common type of this legislation, wherever it has been adopted, all express private passive trusts in land have been abolished, and the express private active trusts have been restricted to a few specified forms and objects.[3]

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[1] 1 Spence's Eq. Jur. 495–497; Cook v. Fountain, 3 Swanst. 591, 592, per Lord Nottingham; Adair v. Shaw, 1 Schoales & L. 262, per Lord Redesdale; Lloyd v. Spillett, 2 Atk. 150; Raikes v. Ward, 1 Hare, 447, 464.

[2] 1 Spence's Eq. Jur. 496, 497; Lord Glenorchy v. Bossville, Cas. t. Talb. 3.

§ 154. **Express Public Trusts or Charities.**— In private trusts there is not only a certain trustee who holds the legal estate, but there is a certain specified *cestui que trust.* It is an essential feature of public or charitable trusts, that the beneficiaries are uncertain, a class of persons described in some general language, often fluctuating, changing in their individuals, and partaking of a *quasi* public character. The most patent examples are "the poor" of a specified district, in a trust of a benevolent character, or "the children" of a specified town, in a trust for educational purposes. It is a settled doctrine in England and in many of the American states, that personal property, and real property except when prohibited by statutes of mortmain, may be bequeathed or conveyed in trust for charitable uses and purposes, for the benefit of such uncertain classes; and if the purposes are charitable within the meaning given to that term, the trust falls within the jurisdiction of equity, and will be enforced.[1] The trusts over which this peculiar jurisdiction extends, and which mark its special nature, should not be confounded with gifts to corporations which are authorized by their charters to receive and hold property, and apply it to objects which fall, perhaps, within the general designation of "charitable." Such gifts are regulated either by the rules of law applicable to corporations, or by the provisions of their individual charters.[2] There is a wide divergence among the states of this country in their acceptance of the doctrine concerning charitable trusts. In some of them, either from a statutory abolition of trusts, or from the general provisions of statutes concerning perpetuities, or from the general public policy of the state legislation, it is held that charitable trusts do not exist at all, except in the instances expressly authorized by statute, which are all gifts to corporations.[3] In a much larger number of the states, the jurisdiction over charitable trusts, either on the ground that the statute of Elizabeth is in force, or as a part of the ordinary powers of equity, has been accepted in a modified form and to a limited extent, and such trusts are upheld only when the property is given to a trustee sufficiently certain, and for purposes and beneficiaries sufficiently definite. In a very few of the states the jurisdiction seems to be accepted to its full extent, and to be exercised in substantially the same manner as it is by the English court of chancery.[4]

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[3] As examples of this type of legislation, see 1 R. S. of N. Y., p. 727, §§ 45–65; Civil Code of Cal., §§ 847, 852, 857–871.

[1] Morice v. Bishop of Durham, 9 Ves. 399, 405, 10 Ves. 522, 541; Mitford v. Reynolds, 1 Phila. 185; Nash v. Morley, 5 Beav. 177; Kendall v. Granger, 5 Beav. 300; Townsend v. Carus, 3 Hare, 257; Nightingale v. Goulburn, 5 Hare, 484; Attorney-General v. Aspinal, 2 Mylne & C. 613, 622, 623; British Museum v. White, 2 Sim. & St. 594, 596; Coggeshall v. Pelton, 7 Johns. Ch. 292, 11 Am. Dec. 471; Saltonstall v. Sanders, 11 Allen, 446; American Academy v. Harvard College, 12 Gray, 582; Jackson v. Phillips, 14 Allen, 539, per Gray, J. Trusts for private objects do not fall within the jurisdiction over charitable trusts, and are void if they create perpetuities; as, for example, those for the erection or repair of private tombs or monuments: In re Rickard, 31 Beav. 244; Fowler v. Fowler, 33 Beav. 616; Hoare v. Osborne, L. R. 1 Eq. 585; or those to found a private museum: Thompson v. Shakespeare, 1 De Gex, F. & J. 399; or those for the benefit of a private

§ 155. **Trusts Arising by Operation of Law.**— The second great division of trusts, and the one which in this country especially affords the widest field for the jurisdic-

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company: Attorney-General v. Haberdashers' Co., 1 Mylne & K. 420; or for a mere private charity: Ommanney v. Butcher, Turn. & R. 260.

[2] See Levy v. Levy, 33 N. Y. 97, 112–118, per Wright, J.; Bascom v. Albertson, 34 N. Y. 584, 587–621, per Porter, J.

[3] New York is a leading example of this class: See Bascom v. Albertson, 34 N. Y. 584; Levy v. Levy, 33 N. Y. 97; Beekman v. Bonsor, 23 N. Y. 298, 80 Am. Dec. 269; Holmes v. Mead, 52 N. Y. 332, 339; Burrill v. Boardman, 43 N. Y. 254, 263, 3 Am. Rep. 694; Adams v. Perry, 43 N. Y. 487.

[4] See Part Third, Chapter of Charitable Trusts, *post.*

tion of equity in granting its special remedies so superior to mere recoveries of damages, embraces those which arise by operation of law from the deeds, wills, contracts, acts, or conduct of parties, without any *express* intention, and often without *any* intention, but always without any words of declaration or creation. They are of two species, "resulting" and "constructive," which latter are sometimes called trusts *ex maleficio;* and both these species are properly described by the generic term "implied trusts."[1] Resulting trusts arise where the legal estate is disposed of or acquired, not fraudulently or in the violation of any fiduciary duty, but the intent in theory of equity appears or is inferred or assumed from the terms of the disposition, or from the accompanying facts and circumstances, that the beneficial interest is not to go with the legal title. In such a case a trust "results" in favor of the person for whom the equitable interest is thus assumed to have been intended, and whom equity deems to be the real owner.[2] [a] Constructive trusts are raised by equity for the purpose of working out right and justice, where there was no intention of the party to create such a relation, and often directly contrary to the intention of the one holding the legal title. All instances of constructive trust may be referred to what equity denominates fraud, either actual or constructive, including acts or omissions in violation of fiduciary obligations. If one party obtains the legal title to property, not only by fraud or by violation of confidence or of fiduciary relations, but in any other unconscientious manner, so that he cannot equitably retain the property which really belongs to another, equity carries out its theory of a double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner.[3] [b] Courts of equity, by thus extending the fundamental principle of trusts — that is, the principle of a division between the legal estate in one and the equitable estate in another — to cases of actual or constructive fraud and breaches of good faith, are enabled to wield a remedial power of tremendous efficacy in protecting the rights of property.

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[1] There is another kind which are sometimes, but very improperly, called "implied" trusts; namely, where a party, by a written instrument, deed, or will, has intended to create a trust for some specific object, and has used language showing that intent; but the language he has employed does not in *express terms* declare and create the trust, so that the court, in deciding upon the effect of the instrument, is obliged to construe or interpret the words, in order that they may amount to a declaration of the trust. The most familiar illustration is that of a trust arising from mere *precatory* words in a deed or will. These trusts have no resemblance whatever to those which "arise by operation of law"; they are in every respect *express* trusts, either active or passive; they only differ in form from ordinary express trusts from a certain vagueness or incompleteness of the language used to create or declare them, so that a court is forced to interpret this language. When interpreted, it becomes in every sense an express declaration of the trust. To include these instances among *implied* trusts is to violate every principle of true classification, and to introduce an unnecessary confusion into the subject. All true implied trusts differ from express trusts, not only in the manner of their creation, but also in their essential features and qualities.

[2] The following cases furnish illustrations: Ackroyd v. Smithson, 1 Brown Ch. 503, 1 Lead. Cas. Eq. 1177; Robinson v. Taylor, 2 Brown Ch. 589; Berry v. Usher, 11 Ves. 87; Watson v. Hayes, 5 Mylne & C. 125;

(a) The text is quoted in Springer v. Young, 14 Oreg. 280, 12 Pac. 400.

§ 156. **Executors and Administrators — Estates of Deceased Owners.**— The theory of trusts express and implied having been established, it was easily extended to certain other analogous subjects which were thus brought within the equi-

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Jessop v. Watson, 1 Mylne & K. 665; Eyre v. Marsden, 2 Keen, 564; Burley v. Evelyn, 16 Sim. 290; Wood v. Cone, 7 Paige, 472, 476; Wood v. Keyes, 8 Paige, 365, 369; Millard v. Hathaway, 27 Cal. 119; Malony v. Sloans, 44 Vt. 311.

[3] 1 Perry on Trusts, § 166; 1 Spence's Eq. Jur. 511, 512; McLane v. Johnson, 43 Vt. 48; Collins v. Collins, 6 Lans. 368; Thompson v. Thompson, 16 Wis. 94; Pillow v. Brown, 26 Ark. 240; Ryan v. Dox, 34 N. Y. 307, 90 Am. Dec. 696; Dodd v. Wakeman, 26 N. J. Eq. 484; Green v. Ball, 4 Bush, 586; Hunt v. Roberts, 40 Me. 187; Hodges v. Howard, 5 R. I. 149; Laing v. McKee, 13 Mich. 124, 87 Am. Dec. 738; Nelson v. Worrall, 20 Iowa, 469; Coyle v. Davis, 20 Wis. 593; Hidden v. Jordan, 21 Cal. 92; Sandfoss v. Jones, 35 Cal. 481.

(b) The text is quoted in Springer v. Young, 14 Oreg. 280, 12 Pac. 400.

table jurisdiction. One of the most important of these was the administration of the estates of deceased persons. The relation subsisting between executors and administrators on the one hand, and legatees, distributees, and creditors on the other, has so many of the features and incidents of an express active trust, that it has been completely embraced within the equitable jurisdiction in England, and also in the United States, where statutes have not interfered to take away or to abridge the jurisdiction. At the common law no action lay to recover a legacy, unless it was a specific legacy of goods, and the executor had assented to it so that the property therein vested in the legatee.[1] Although individual creditors might recover judgments at law for the amount of their respective claims, the legal procedure furnished absolutely no means by which the rights and claims of all distributees, legatees, and creditors could be ascertained and ratably adjusted, the assets proportionably distributed among those having demands of an equal degree as to priority, and the estate finally settled. The power of the ancient "spiritual courts" over the subject-matter was also very limited and imperfect; in many instances it could furnish no relief, and was at best but "a lame jurisdiction."[2] Where the claim against an estate was purely equitable, as where a testator had charged land with his debts or legacies, thus creating an equitable lien, or had devised property in trust for the payment of debts or legacies, and the like, the court of chancery had, of course, an original and exclusive jurisdiction. In all other cases it obtained a jurisdiction because its relief was more complete, and it alone could provide for the rights and claims of all parties. This jurisdiction at length became firmly established and practically exclusive on this ground of trusts; that the relation between the executor or administrator and the parties interested in the estate is virtually one of express trust, which equity has always the power to enforce.[3] Throughout the great majority of the United States, however, this jurisdiction of equity, even where not expressly abrogated, has become virtually obsolete. Partly from prohibitory and partly from permissive statutes, the jurisdiction over the administration of decedents' estates in all ordinary cases has been wholly withdrawn from the equity tribunals and exclusively exercised by the probate courts in all the states, with very few exceptions.[4] Although the general jurisdiction of equity over the subject of administrations is thus practically, and even in some instances expressly, abolished in so many states, still the jurisdiction remains in all matters of trust created by or arising from the provisions of wills; and thus a large field is left for the exercise of the equitable jurisdiction in the construction of wills, and in the determination and enforcement of equitable rights, interests, and estates created and conferred thereby.[5] (a)

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[1] Deeks v. Strutt, 5 Term Rep. 690; Doe v. Guy, 3 East, 120.

[2] See Pamplin v. Green, 3 Cas. Chan. 95; Matthews v. Newby, 1 Vern. 134, 2 Freem. 189; Petit v. Smith, 5 Mod. 247.

§ 157. **Fiduciary Relations.**— The equitable doctrine of trusts has also been extended so as to embrace, either wholly or partially, many other relations besides those of trusts created by private owners of property. Guardians of infants, committees or guardians of the insane, receivers, directors, and other managers of stock corporations, and the like, are in a general sense trustees, or rather *quasi* trustees, in respect of the particular persons towards whom they stand in a fiduciary relation,— the wards, stockholders, etc.[1] [a] But the analogy should not be pushed too far. The trust which exists in these and similar cases is not of so high and complete a character that equity has an exclusive jurisdiction over the rights and interests of the beneficiaries, to maintain and enforce them against the trustees. The law, by means of its actions *ex æquo et bono,* supplies the beneficiaries with sufficient remedies for many violations of such fiduciary relations. The relations in which such persons stand towards their beneficiaries partake so much of the trust character, however, that equity possesses a jurisdiction in many instances where its remedies are more effective, or its modes of procedure enable the court to do more complete justice by its decrees.

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[3] See Adair v. Shaw, 1 Schoales & L. 262, per Lord Redesdale; Anonymous, 1 Atk. 491, per Lord Hardwicke.

[4] See *post*, chap. iii., sec. ii., §§ 346–352, where this matter is more fully described.

[5] Whitman v. Fisher, 74 Ill. 147; Campbell's Appeal, 80 Pa. St. 298; Harris v. Yersereau, 52 Ga. 153; Dorsheimer v. Rorback, 23 N. J. Eq. 46; Youmans v. Youmans, 26 N. J. Eq. 149; Haag v. Sparks, 27 Ark. 594; Jones v. Jones, 28 Ark. 19; Duncan v. Duncan, 4 Abb. N. C. 275; Marlett v. Marlett, 14 Hun, 313; Chipman v. Montgomery, 63 N. Y. 221; Bailey v. Briggs, 56 N. Y. 407; Brundage v. Brundage, 65 Barb. 397; Collins v. Collins, 19 Ohio St. 468; Perkins v. Caldwell, 77 N. C. 433; Heustis v. Johnson, 84 Ill. 61; Matter of Broderick's Will, 21 Wall. 504.

(a) The text is cited in Benedict v. Wilmarth (Fla.), 35 South. 84. See, as to the jurisdiction in administration of decedents' estates, *post*, §§ 1152–1154, and notes.

§ 158. While the jurisdiction of equity in these last-mentioned cases of fiduciary relations is concurrent and depends upon the superiority of its remedies, the exclusive jurisdiction in the cases before described of private express trusts proper, whether passive or active, is wholly independent of the nature of the remedies given. The actual remedies which a court of equity gives depend upon the nature and object of the trust; sometimes they are specific in their character, and of a kind which the law courts cannot administer, but often they are of the same general kind as those obtained in legal actions, being mere recoveries of money. A court of equity will always by its decree declare the rights, interest, or estate of the *cestui que trust,* and will compel the trustee to do all the specific acts required of him by the terms of the trust. It often happens that the *final* relief to be obtained by the *cestui que trust* consists in the recovery of money. This remedy the courts of equity will always decree when necessary, whether it is confined to the payment of a single specific sum, or involves an accounting by the trustee for all that he has done in pursuance of the trust, and a distribution of the trust moneys among all the beneficiaries who are entitled to share therein.

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[1] Keech v. Sanford, Sel. Cas. Ch. 61, 1 Lead. Cas. Eq. 48; Fox v. Mackreath, 2 Brown Ch. 400, 2 Cox, 320, 1 Lead. Cas. Eq. 188; Morret v. Paske, 2 Atk. 54; Kimber v. Barber, L. R. 8 Ch. 56; Powell v. Glover, 3 P. Wms. 252; Wedderburn v. Wedderburn, 4 Mylne & C. 41; Gt. Luxembourg R'y Co. v. Magnay, 25 Beav. 586; Docker v. Somes, 2 Mylne & K. 665; Knox v. Gye, L. R. 5 H. L. 656, 675; Gresley v. Mousley, 4 De Gex & J. 78, 3 De Gex, F. & J. 433; Holman v. Loynes, 4 De Gex, M. & G. 270; Hesse v. Briant, 6 De Gex, M. & G. 623; Knight v. Bowyer, 2 De Gex & J. 421, 445; Savery v. King, 5 H. L. Cas. 627; Dodge v. Woolsey, 18 How. 331, 341; Koehler v. Black R., etc., Co., 2 Black, 715; Butts v. Wood, 37 N. Y. 317; Bliss v. Matteson, 45 N. Y. 22; Neall v. Hill, 16 Cal. 145, 76 Am. Dec. 508.

(a) The text is cited in Benedict v. Wilmarth (Fla.), 35 South. 84; in Donahue v. Quackenbush, 75 Minn. 43, 77 N. W. 430 (receiver as trustee).

§ 159. **Married Women's Separate Property.**— The married woman's separate estate, prior to any legislation on the subject, is merely a particular case of trusts, and the jurisdiction of equity over it has been long established.[1] As the wife's interest in the property held to her separate use is wholly a creature of equity, the equitable jurisdiction over it is of course exclusive; and in direct antagonism to the common-law theory, equity regards and treats the wife, with respect to such separate estate, as though she were unmarried.[2] This equitable separate estate of married women being only a species of trust property held upon express trust, either passive or active, it is of course embraced within the legislation of various states abolishing or restricting and regulating such trusts.

§ 160. This jurisdiction of equity, so far as it is concerned with the contracts of married women, and their other dealings with their separate property, has been greatly enlarged by the modern legislation in many of the states. These statutes, it is true, do not create any equitable estate; their effect is to vest a purely legal title in the wife, and to free such title from the interests and claims and rights which the common law gave to the husband. But while the legislation thus acts upon her title, it does not, in general, remove the common-law disability of entering into contracts, or clothe the wife with a general capacity of making contracts which are binding at law, and enforceable against them by legal actions. The matter of married women's contracts is therefore left exclusively to courts of equity, and is governed by equitable doctrines. The jurisdiction of equity in the enforcement of married women's liabilities against their separate property has thus been enlarged, since it has been extended in these states to all the property which a wife may hold by a legal title, and is not confined to such equitable estate as is held for her separate use.[1]

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[1] See Drake v. Storr, 1 Freem. 205, which shows that in 1695 the wife's separate estate was a well-settled doctrine of equity.

[2] Lady Arundel v. Phipps, 10 Ves. 140; Grigby v. Cox, 1 Ves. Sen. 517; Hulme v. Tenant, 1 Brown Ch. 16; Field v. Sowle, 4 Russ. 112; Owens v. Dickenson, Craig & P. 48; Nantes v. Corrock, 9 Ves. 189; Aylett v. Ashton, 1 Mylne & C. 105, 112; La Touche v. La Touche, 3 Hurl. & C. 576; Heatley v. Thomas, 15 Ves. 596; McHenry v. Davies, L. R. 10 Eq. 88; Murray v. Barlee, 3 Mylne & K. 209; Owen v. Homan, 4 H. L. Cas. 997; Johnson v. Gallagher, 3 De Gex, F. & J. 494, 521.

§ 161. **Equitable Estates Arising from the Doctrine of Conversion.**— The doctrine of "conversion" is a particular application of the principle that equity regards as done what ought to be done. The doctrine itself was thus stated by an eminent English equity judge in the leading case upon the subject: "Nothing is better settled than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this, in whatever manner the direction is given, whether by will, by way of contract, marriage articles, settlement, or otherwise; and whether the money is actually deposited or only covenanted to be paid, whether the land is actually conveyed or only agreed to be conveyed, the owner of the fund, or the contracting parties, may make land money, or money land. The cases establish this rule universally."[1] As this doctrine of conversion is wholly a creation of the equitable jurisprudence, the estates or interests which result from it are entirely equitable in their nature, and equity has an exclusive jurisdiction to maintain and protect such interests, whether the remedy which it gives in any particular case consists in establishing a person's right to a specific piece of land, or merely in granting a recovery of money.[a]

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[1] See *post*, part iii., chapter on Married Women's Separate Property, where an abstract of the legislation in the various states is given.

§ 162. **Mortgages.**[a] — At the common law a mortgage of land is a conditional conveyance of the legal title, subject to be defeated by the mortgagor's performing the condition, paying the debt on the very day stipulated. If the condition for any reason was not performed on that day, the conveyance *ipso facto* became absolute, the mortgagee's estate became a perfect legal title, in fee, for life, or for years, according to the terms of the deed, and all the mortgagor's interest under the instrument was completely gone. In other words, the law applied to a mortgage the same strict rules which had been established with regard to every conditional conveyance. Side by side with this harsh system of the law, the court of chancery developed another theory, which may justly be regarded as the most magnificent triumph of equity jurisprudence over the injustice of the common law. The source of this theory was found in the principle that equity can and will relieve against legal penalties and forfeitures, whenever the person who seeks to enforce them may be fairly compensated by an award of money. As early as the reign of James I. the court of chancery had begun to relieve the mortgagor; and in the reign of Charles I. his right to redeem, after a failure to perform the condition, had become fully recognized as a part of the equity jurisprudence.[1] This equitable right of the mortgagor was termed his "equity of redemption;" that is, his "right in equity to redeem." At first this equity of redemption was regarded as a mere right or thing in action, and at the close of the reign of Charles II. it was said to be a *mere right* to recover the land in equity after a failure to perform the condition, and not to be an *estate* in the land.[2] This narrow view, however, was soon abandoned; the equitable theory became more consistent and complete, until in 1737 Lord Hardwicke laid down the doctrine as already established, and which has since been regarded as the very central notion of the equitable theory, that an equity of redemption is (in equity) *an estate in the land,* which may be devised, granted, or entailed with remainder; that it cannot be considered as a mere right only, but such an estate whereof there may be a seisin; and that the person therefore entitled to the equity of redemption is considered as the owner of the land, and a mortgage in fee is considered as personal assets.[3] It should be carefully observed that by this theory the mortgagor's estate is wholly an equitable one; neither in equity nor at law is he regarded as retaining the legal estate. Being purely a creation of equity, it fell, of course, under the exclusive jurisdiction of chancery, and was maintained and protected by means of the remedy obtained in a suit for redemption. This double mode of dealing with mortgages, the legal, the only one recognized and administered by the courts of law, and the equitable, prevailing alone in the court of chancery, has continued to exist in England until the present day.

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[1] Fletcher v. Ashburner, 1 Brown Ch. 497, per Sir Thomas Sewell, M. R.; Lechmere v. Carlisle, 3 P. Wms. 223; Wheldale v. Partridge, 5 Ves. 396, 8 Ves. 227; Harcourt v. Seymour, 2 Sim. N. S. 12, 45; In re Pedder, 5 De Gex, M. & G. 890; Craig v. Leslie, 3 Wheat. 564; Peter v. Beverly, 10 Pet. 534, 563; Lorillard v. Coster, 5 Paige, 173, 218; Gott v. Cook, 7 Paige, 523, 534; Kane v. Gott, 24 Wend. 641, 659, 660, 35 Am. Dec. 641; Pratt v. Taliaferro, 3 Leigh, 419, 421, 427; Siter v. McClanachan, 2 Gratt. 280; Smith v. McCrary, 3 Ired. Eq. 204, 207; Samuel v. Samuel's Adm'rs, 4 B. Mon. 245, 253; Allison v. Wilson's Ex'rs, 13 Serg. & R. 330, 332.

§ 161, (a) The text is cited in Greenland v. Waddell, 116 N. Y. 239, 15 Am. St. Rep. 400, 22 N. E. 367.

§ 162, (a) Sections 162, 163 are cited in Savings & Loan Soc. v. Davidson, 97 Fed. 696, 713, 38 C. A. A. 365.

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[1] Emanuel College v. Evans, 1 Rep. Chan. 18; 1 Jones on Mortgages, §§ 6, 7; Coote on Mortgages, 21.

[2] Roscarrick v. Barton, 1 Cas. Chan. 217.

[3] Casborne v. Scarfe, 1 Atk. 603.

§ 163. The English system has not been adopted to its full extent in any of the American states. Two entirely different methods of viewing the mortgage have become established in the states of this country, and the states themselves must be separated into two great classes with respect to their adoption of one or the other of these methods: 1. In nearly half of the states and territories the conflict between the legal and the equitable conceptions is entirely removed. The legal theory of mortgages has been abandoned, and the equity theory has been left in full force, furnishing a single and uniform collection of rules, recognized and administered, so far as necessary, alike by courts of law and of equity. The mortgage is not a conveyance; it confers no estate in the land upon the mortgagee. It simply creates a *lien* on the land as security for the debt due. The mortgagor's estate, instead of being equitable, an equity of redemption, is, for all purposes, and between all parties, the legal estate, but encumbered by the lien created by the mortgage. This simple conception is carried out with all its consequences, not only as between the immediate parties, but as between all persons who have or acquire any interest in or claim upon the mortgage itself or the land which is subject to the mortgage.[1] 2. The second method, which prevails in the residue of the states and territories, may be briefly described as follows: Between the immediate parties — the mortgagor and mortgagee and persons holding under them — the legal conception is acknowledged, and the legal rights and duties flowing from the mortgage as a conveyance of the legal estate are recognized and enforced by the courts of law. But as between the mortgagor and his representatives and all other persons not holding under or through the mortgagee, the legal conception has been entirely abandoned, and the equity view has been adopted by all courts, of law as well as of equity. Finally, the equity theory exists, is in fact the only one administered by courts of equitable jurisdiction, and is applied by them to all parties in the same manner and to the same extent as by the court of chancery in England.[2]

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[1] This method has been adopted in the following states and territories; California, Colorado, Dakota, Florida, Georgia, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, Nebraska, Nevada, New York, Oregon, South Carolina, Texas, Utah, and Wisconsin.

§ 164. **Mortgage of Personal Property.**— While a mortgage of personal property is, at the common law, a conditional sale, which becomes absolute, passing a perfect *legal* ownership on the mortgagor's failure to perform the condition, yet the doctrine is well settled that an equity of redemption exists; and the equitable jurisdiction is undoubted to relieve the mortgagor by a suit to redeem, even though the mortgagee has taken possession of the chattels, at any time before the mortgagor's right has been foreclosed by a public sale of the mortgaged property.[a] Even after such a sale, if there has been any element of bad faith or inequitable conduct on the part of the mortgagee, the mortgagor may still sometimes maintain a suit for an accounting.[1] The jurisdiction also extends to the mortgagee's interest, which may be protected and enforced by a suit brought to foreclose the mortgagor's right of redemption, and to sell the mortgaged property, similar to the suit so common in the United States for the foreclosure of a mortgage of land.[2] [b] A like jurisdiction exists over pledges of chattels or of things in action; the pledgee may enforce his security by a suit for a foreclosure and sale.[3] [c] Under special circumstances the pledgor may maintain an equitable action for a redemption.[4] In some of the states the common-law view of the chattel mortgage as a conditional *sale* has been totally abandoned; the mortgage itself has been assimilated to the mortgage of land as only creating a lien,— a mere hypothecation,— the legal ownership with all its incidents, including the right of possession, being left in the mortgagor until the lien is enforced and the mortgagor's interest extinguished, either by means of an equitable suit or by a public sale.[5]

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§ 163, [2] The second method has been adopted in the following states: Alabama, Arkansas, Connecticut, Delaware, Illinois, Kentucky, Maine, Maryland, Massachusetts, Mississippi, Missouri, New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, and West Virginia.

§ 164, [1] Hart v. Ten Eyck, 2 Johns. Ch. 100, 101; Stoddard v. Denison, 7 Abb. Pr. N. S. 309; Flanders v. Chamberlain, 24 Mich. 305; Heyland v. Badger, 35 Cal. 404.

§ 164, [2] Hart v. Ten Eyck, 2 Johns. Ch. 100; Lansing v. Goelet, 9 Cow. 372, per Jones, C.; Charter v. Stevens, 3 Denio, 33, 45 Am. Dec. 444; Huntington v. Mather, 2 Barb. 538; Mattison v. Baucus, 1 N. Y. 296.

(a) The text is cited to this effect in Lang v. Thacher, 48 App. Div. (N. Y.) 313, 62 N. Y. Suppl. 956.

(b) This paragraph of the text is cited in M'Cormick v. Hartley, 107 Ind. 248, 6 N. E. 357 (jurisdiction to protect the mortgagee's interest before the debt is due).

§ 165. **Equitable Liens**, analogous to mortgages, considered from the purely equitable point of view, are the class of interests embraced under the denomination of "equitable liens." An equitable lien is not an estate or property in the thing itself, nor a right to recover the thing, — that is, a right which may be the basis of a possessory action; it is neither a *jus ad rem* nor a *jus in re*.[1] It is simply a right of a special nature *over* the thing, which constitutes a charge or encumbrance upon the thing, so that the very thing itself may be proceeded against in an equitable action, and either sold or sequestered under a judicial decree, and its proceeds in the one case, or its rents and profits in the other, applied upon the demand of the party in whose favor the lien exists. It is the very essence of this conception, that while the lien continues, the possession of the thing remains with the debtor or person who holds the proprietary interest subject to the encumbrance.[2]

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[3] Ex parte Mountford, 14 Ves. 606; Freeman v. Freeman, 17 N. J. Eq. 44; Dupuy v. Gibson, 36 Ill. 197; Donohue v. Gamble, 38 Cal. 340; Civ. Code of Cal., § 3011.

[4] Jones v. Smith, 2 Ves. 372; Bartlett v. Johnson, 9 Allen, 530; Hasbrouck v. Vandervoort, 4 Sand. 74.

[5] As, for example, in California: Civ. Code, §§ 2920, 2923, 2927, 2931, 2936, 2967–2970, 3000–3002.

[1] See Peck v. Jenness, 7 How. 620, per Grier, J.

(c) Cited to this effect in Cleghorn v. Minnesota T. I. & T. Co., 57 Minn. 341, 47 Am. St. Rep. 615, 59 N. W. 320. This section of the text was cited in Knapp, Stout & Co. v. McCaffrey, 178 Ill. 107, 69 Am. St. Rep. 290, 52 N. E. 898, and the principle applied, by analogy, to the enforcement in equity of a *bailee's* lien

§ 166. The doctrine of equitable liens is one of great importance, and of wide application in administering the remedies peculiar to equity jurisprudence, and a brief explanation of the foundation and reasons of the jurisdiction is essential to a full understanding of the subject. It is sometimes, although unnecessarily and even incorrectly in my opinion, spoken of as a branch of implied trusts; but it is more accurate to describe these liens as *analogous to* trusts; for although they have some similar features, they are unlike in their essential elements. The common-law remedies upon all contracts, except those which transfer a legal estate or property, such as conveyances of land and sales or bailments of chattels, are always *mere* recoveries of money; the judgments are wholly personal, in ancient times were enforced against the person of the debtor, by his imprisonment until he voluntarily paid the amount, and in modern times, against the property generally of the judgment debtor, by means of an execution. This species of remedy is seldom granted by equity, and is opposed to its general theory. The remedies of equity are as a class specific. Although it is commonly said of them that they are not *in rem,* because they do not operate by the inherent force of the decree in an equitable suit to change or to transfer the title or estate in controversy, yet these remedies are, as a general rule, directed against some specific thing; they give or enforce a right to or over some particular identified thing, land, or personal property, or a fund, rather than a right to recover a sum of money generally out of the defendant's assets. Remedies in equity, as well as at law, require some primary right or interest of the plaintiff, which shall be maintained, enforced, or redressed thereby. When equity has jurisdiction to enforce rights and obligations growing out of an executory contract, this equitable theory of remedies cannot be carried out, unless the notion is admitted that the contract creates some right or interest in or over specific property, which the decree of the court can lay hold of, and by means of which the equitable relief can be made efficient. The doctrine of "equitable liens" supplies this necessary element, and it was introduced for the sole purpose of furnishing a ground for the specific remedies which equity confers, operating upon particular identified property, instead of the general pecuniary recoveries granted by courts of law. It follows, therefore, that in a large class of executory contracts, express or implied, which the law regards as creating no property right nor interest analogous to property, but only a mere personal right and obligation, equity recognizes, *in addition to the obligation,* a peculiar right *over* the thing with which the contract deals, which it calls a "lien," and which, though not property, is analogous to property, and by means of which the plaintiff is enabled to follow the identical thing, and to enforce the defendant's obligation by a remedy which operates directly upon that thing.

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[2] **Brace v. Duchess of Marlborough, 2 P. Wms. 491; Ex parte Knott, 11 Ves. 617.**

§ 167. These equitable liens may be created by express executory contracts relating to specific property then existing,[1] or property to be afterwards acquired;[2] and sometimes by implied contracts, upon the maxim that he who seeks the aid of equity in enforcing some claim must himself do equity.[3] The following are some of the important kinds of equitable liens which are recognized as falling under this branch of the jurisdiction: Those resulting from charges on property by will or by deed;[4] the grantor's lien on land conveyed for the unpaid price;[5] the vendee's lien for the money paid in a contract for the purchase of land;[6][a] the vendor's lien for the purchase price in the same contract;[7] the grantor's lien for unpaid price created by express reservation in a deed of conveyance;[8] the lien in favor of a lender, created by a deposit of title deeds;[9] various statutory liens.[b] In addition to the liens above mentioned, which belong to the general equitable jurisprudence, the legislation of many states has created or allowed other liens, which often come within the equity jurisdiction, in respect, at least, to their means of enforcement. The so-called "mechanics' liens" may be taken as the type and illustration of this class.[c]

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[1] Ex parte Wills, 1 Ves. 162, 2 Cox, 233; Card v. Jaffray, 2 Schoales & L. 379; In re Howe, 1 Paige, 125, 19 Am. Dec. 395; Chase v. Peck, 21 N. Y. 581; Daggett v. Rankin, 31 Cal. 321, 326; Love v. Sierra Nevada Co., 32 Cal. 639, 652, 653, 91 Am. Dec. 602; Pinch v. Anthony, 8 Allen, 536; Adams v. Johnson, 41 Miss. 258; Morrow v. Turney, 35 Ala. 131.

[2] Holroyd v. Marshall 10 H. L. Cas. 191; Wellesley v. Wellesley, 4 Mylne & C. 561, 579, per Lord Cottenham; Metcalfe v. Archb. of York, 6 Sim. 224, 1 Mylne & C. 547, 556; Lyde v. Minn, 4 Sim. 505, 1 Mylne & K. 683; Otis v. Sill, 8 Barb. 102.

[3] Lake v. Gibson, 1 Abr. Cas. Eq. 290, pl. 3; Lake v. Craddock, 3 P. Wms. 158, 1 Lead. Cas. Eq. 177, 179; Gladstone v. Birley, 2 Mer. 403; Bright v. Boyd, 1 Story, 478, 2 Story, 605; Miner v. Beekman, 50 N. Y. 337; Smith v. Drake, 23 N. J. Eq. 302; McLaughlin v. Barnum, 31 Md. 425; Sale v. Crutchfield, 8 Bush, 636.

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[4] King v. Denison, 1 Ves. & B. 272, 276; Hill v. Bishop of London, 1 Atk. 620; Craig v. Leslie, 3 Wheat. 582; Gardner v. Gardner, 3 Mason, 178.

[5] Mackreth v. Symmons, 15 Ves. 329, 1 Lead. Cas. Eq. 289; Blackburn v. Gregson, 1 Brown Ch. 420; Rose v. Watson, 10 H. L. Cas. 672; Smith v. Evans, 28 Beav. 59. This lien is established in a large number of the states, but not in all.

[6] Cator v. Earl of Pembroke, 1 Brown Ch. 301; Rose v. Watson, 10 H. L. Cas. 672; Wythes v. Lee, 3 Drew. 396; Lane v. Ludlow, 6 Paige, 316, note; Chase v. Peck, 21 N. Y. 585; Wickman v. Robinson, 14 Wis. 494, 80 Am. Dec. 789; Stewart v. Wood, 63 Mo. 252; Willis v. Searcy, 49 Ala. 222.

[7] Smith v. Hibbard, Dick. 730; Smith v. Evans, 28 Beav. 59; Haughwout v. Murphy, 22 N. J. Eq. 531; Hall v. Jones, 21 Md. 439; Yancy v. Mauck, 15 Gratt. 300; Hill v. Grigsby, 32 Cal. 55; Smith v. Rowland, 13 Kan. 245.

[8] This species of lien, peculiar to the United States, is fully established in several of the states: Heist v. Baker, 49 Pa. St. 9; Carpenter v. Mitchell, 54 Ill. 126; Markoe v. Andras, 67 Ill. 34; Davis v. Hamilton, 50 Miss. 213; Stratton v. Gold, 40 Miss. 781; White v. Downs, 40 Tex. 226; King v. Young Men's Ass'n, 1 Woods, 386.

[9] This lien is very common in England, and has been recognized in some of the states: Russell v. Russell, 1 Brown Ch. 269; Ex parte Hooper, 1 Mer. 7; Parker v. Housefield, 2 Mylne & K. 419; Whitbread v. Jordan, 1 Younge & C. 303.

(a) The text is cited in Stults v. Brown, 112 Ind. 370, 2 Am. St. Rep. 190, 14 N. E. 230.

(b) The text is cited in Hibernia Sav. & L. Soc. v. London & Lancashire Fire Ins. Co., 138 Cal. 257, 71 Pac. 334 (action to enforce a judgment lien against property of decedent).

§ 168. **Equitable Estate or Interest Arising from an Assignment of Things in Action, Possibilities, Contingencies, or Expectancies, and from an Equitable Assignment of a Fund.**— By the ancient common law, things in action, possibilities, expectancies, and the like, were not assignable; an assignee thereof acquired no right which was recognized by courts of law. Equity, however, has always held that the assignment of a thing in action for a valuable consideration should be enforced at the suit of the assignee; and has also given effect to assignments of every kind of future and contingent interests and possibilities in real and personal property, when made upon a valuable consideration.[1] [a] As soon as the assigned expectancy or possibility has fallen into possession, the assignment will be enforced.[2] It followed, therefore, that the assignee of a thing in action acquired at once an equitable ownership therein, as far as it is possible to predicate *property* or ownership of such a species of right; while the assignee of an expectancy, possibility, or contingency acquired at once a present equitable right over the future proceeds of the expectancy, possibility, or contingency, which was of such a certain and fixed nature that it was sure to ripen into an ordinary equitable property right over those proceeds, as soon as they came into existence by a transformation of the possibility or contingency into an interest in possession. There was an equitable ownership or property in abeyance, so to speak, which finally changed into an absolute property upon the happening of the future event. Equity permitted the creation and transfer of such an ownership.[b] At an early day, this species of equitable ownership arising from assignments prohibited by the common law was very important, and was the occasion of an extensive branch of the equitable jurisdiction. This special jurisdiction has, however, been greatly curtailed. Modern statutes, both in England and in the American states, permit, with certain well-defined exceptions, things in action, possibilities, expectancies, and contingencies to be assigned, and the assignee to sue thereupon in his own name. As far as this legislation has gone, it has, in effect, turned the equitable right or ownership of the assignee into a legal one, and has thus removed the very foundation of the equitable jurisdiction over the subject-matter. The jurisdiction is therefore abrogated, except so far as it is preserved by the operation of the general principle, that where the jurisdiction of equity has been established over any given subject, it is not abolished by subsequent statutes conferring jurisdiction over the same subject upon the courts of law. Whatever may be the effect of these statutes in abridging, or rather in removing occasion for, the jurisdiction of equity, it is plain that the jurisdiction must still exist in the cases where a thing in action or demand purely equitable in its nature is assigned, and where the assignment itself is equitable,— that is, does not operate as an assignment at law,— and where any species of possibility or expectancy not within the scope of the statutes is transferred.[c]

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[1] Warmstrey v. Lady Tanfield, 1 Ch. Rep. 16; Wright v. Wright, 1 Ves. Sen. 411; Hobson v. Trevor, 2 P. Wms. 191; Bennett v. Cooper, 9 Beav. 252; Lindsay v. Gibbs, 22 Beav. 522; Spragg v. Binkes, 5 Ves. 588; Stokes v. Holden, 1 Keen, 152, 153; Jewson v. Moulson, 2 Atk. 421.

[2] Holroyd v. Marshall, 10 H. L. Cas. 191.

(c) The text is cited in Gilchrist v. Helena Hot Springs & Smelter R. Co., 58 Fed. 708, 710, holding that equity has jurisdiction to enforce statutory liens when the statute itself provides no method of enforcement.

(a) The text is cited to this effect in In re Garcelon, 104 Cal. 570, 38 Pac. 414, 32 L. R. A. 595, 43 Am. St. Rep. 134; Hale v. Hollon, 14 Tex. Civ. App. 96, 35 S. W. 843, 36 S. W. 288.

§ 169. Among these cases which are untouched by the legislation, and over which the exclusive jurisdiction of equity still continues unabridged, is the equitable assignment of a specific fund which is in the hands of a third

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(b) The text is quoted in Stott v. Franey, 20 Oreg. 410, 23 Am. St. Rep. 132, 26 Pac. 271.

(c) The text is quoted in Stott v. Franey, 20 Oreg. 410, 23 Am. St. Rep. 132, 26 Pac. 271.

person, an assignment which does not operate at law, and therefore creates no legal rights of property in the assignee. If A has a specific fund in the hands of B, or in other words, if B is a depositary or otherwise holds a specific sum of money which he is bound to pay to A, and if A agrees with C that the money shall be paid to C, or assigns it to C, or gives to C an order upon B for it, the agreement, assignment, or order creates an equitable ownership of the fund in the assignee C, so that he can recover it by a suit in equity, and it is not necessary that B should consent or promise to hold it for or pay it to such assignee.[1] It is not necessary that the entire debt or fund should be thus assigned; the same doctrine applies to the assignment of a definite portion of it.[2] [a]

§ 170. **Exclusively Equitable Remedies.**— Having thus explained the equitable primary rights, estates, interests, and charges in and upon property over which the exclusive jurisdiction of equity extends, I now proceed to enumerate the remedies which are wholly equitable, administered by courts of equity alone, and which therefore constitute the other department of the exclusive jurisdiction. There are certain general qualities belonging to all these remedies, which should be clearly and correctly understood; otherwise our notions of the remedial functions of equity will be partial, confused, and even erroneous. 1. These exclusive remedies may be granted in order to protect, maintain, or enforce primary rights, estates, or interests which are legal as well as those which are equitable; they are not administered in behalf of equitable substantive rights alone. As illustrations, an injunction is often given to prevent the invasion of a legal ownership or interest, a decree quieting title is often rendered to establish an existing legal estate, and the like. And in many instances where the existing primary right, estate, or interest of the complainant is equitable, the very object and effect of the remedy is to clothe him with the corresponding legal right, estate, or interest; as, for example, when the beneficiary under a constructive trust, or the vendee under a contract for the sale of land, obtains a decree directing a conveyance of the legal title. 2. Although it was said in the earliest days of the jurisdiction of chancery, and has been constantly repeated by writers and judges to the present time, that equitable remedies act wholly on the person, *in personam,* and not upon property, *in rem,* the exact meaning and limits of this rule must be accurately understood, or else it will be very misleading, and will entirely misrepresent the theory of the equity remedial system. It has no significance beyond the fact that, according to the practice adopted by the court of chancery from prudential motives, the decrees of the court did not, so to speak, execute themselves by divesting the defendant of estates or interests, and vesting the same in the plaintiff; defendants were ordered to do specified acts, such as the execution of conveyances, the delivery up and cancellation of instruments, and the like, which would, when done, establish, perfect, and secure the rights adjudged to be held by the plaintiffs; the decree that a conveyance of land should be made by the defendant to the plaintiff did not of *itself* operate as a title, did not of itself transfer the estate to the plaintiff; nor was an officer of the court authorized to execute the conveyance; the defendant himself was ordered to do the act, and he alone could perform it; his refusal simply brought on him the punishment of fine and imprisonment until he consented to obey. This ancient quality in the operation of equitable remedies has been greatly modified by various statutes in the United States, which, in some instances, provide that a decree establishing an estate, interest or right of property in the plaintiff shall execute itself, shall be of itself a muniment of title, by divesting the defendant of the interest and vesting the same in the plaintiff, without any conveyance or other instrument of transfer. The decree alone, being on record, operates as a sufficient security of the plaintiff's rights as adjudged. In other instances, an officer of the court, commissioner, master, or referee is authorized to carry out the provisions of the decree by executing the necessary instruments, which are thereupon the plaintiff's muniments of title, with the same effect as though they had been executed by the defendant himself. Finally, in many instances, the decree must, from the nature of the remedy,— e. g., an injunction,— act directly against the defendant personally, and order him to do or to refrain from certain acts. The maxim referred to has therefore a very limited application. When we turn from this mere external manner in which equitable remedies were enforced according to the original chancery procedure to the essential, and so to speak internal, nature and qualities of the remedies themselves, instead of their being merely personal, it is one of the distinctive and central principles of the equity remedial system that it deals with property rights,— estates, interests, liens,— rather than with the mere *personal* rights and obligations of the litigant parties. This tendency of equity to base its remedies upon the rights of *property,* in their various grades, from complete estates to liens or charges, is exhibited in the clearest manner in all its suits brought to enforce the rights and duties growing out of contracts. Although the contract is executory, even though it stipulates only with respect to things not yet in existence,— things to be acquired in future,— the remedial right is worked out by conceiving of a present ownership, interest, lien, or charge, as arising from the executory provisions, or a present possibility which will ripen into such an interest, and by establishing this proprietary right, protecting and enforcing it. The decree, with a few exceptional cases, passes over the *personal* rights of the plaintiff, and the personal obligations of the defendant, deals with rights or interests in property, and shapes its relief by conferring rights, or imposing duties growing out of or connected with some grade of property. Even when the executory contract creates what at law would be a debt, and when the recovery at law would be a general pecuniary judgment, the equitable remedy views this debt as an existing fund, and awards its relief in the form of an ownership of or lien upon that fund. A general pecuniary judgment to be recovered from the debtor's assets at large — as an award of damages — is only granted by a court of equity under very exceptional circumstances.[1] 3. Another quality of the distinctively equitable remedies, connected with and perhaps growing out of the one last mentioned, is their *specific* character, both with respect to substance and form. Except in actions to recover possession of land or of chattels ("action of right," "ejectment," or "replevin"), the legal remedies by action are all general recoveries of specified sums of money, which may be collected by execution out of any property of the debtor not exempted. The equitable remedies, with a few exceptions, are specific; deal with specific things, land, chattels, choses in actions, funds; establish specific rights, estates, interests, liens, and charges in or over these things; and direct specific acts to be done or omitted with respect to these things, for the purpose of enforcing the rights and duties thus declared. Even when the controversy is concerning pecuniary claims and obligations, and the final relief is wholly pecuniary, the equitable remedies are administered by regarding the subject-matter as a specific fund, and by adjudging such fund to its single owner, or by apportioning it among the several claimants. It is the distinctive feature of the system, which gives it a superior efficacy over the legal methods, that it ascertains a rightful claimant's interest in or over a specific thing, land, chattels, choses in action, debts, and even money in the form of a fund, and follows it through the hands of successive possessors as long as it can be identified. The two qualities which I have thus described, that equitable remedies deal with property rights rather than with personal rights and obligations, and that they are specific in their nature, are the peculiar and important features of the system, and give it the power of expansion and of application to an unlimited variety of circumstances, which enables equity to keep abreast with the progress and changing wants of society. 4. Another quality of equitable remedies is their unlimited variety of form. It is absolutely impossible to enumerate all the special kinds of relief which may be granted, or to place any bounds to the power of the courts in shaping the relief in accordance with the circumstances of particular cases. As the nature and incidents of proprietary rights and interests, and of the circumstances attending them, and of the relations arising from them, are practically unlimited, so are the kinds and forms of specific relief applicable to these circumstances and relations.[a] The ordinary remedies, however, which are administered by equity, those which are appropriate to the circumstances and relations most frequently arising, are well ascertained and clearly defined, both as to their form and nature. Cer-

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[1] Rodick v. Gandell, 1 De Gex, M. & G. 763; Ex parte Imbert, 1 De Gex & J. 152; Jones v. Farrell, 1 De Gex & J. 208; Gurnell v. Gardner, 9 Jur., N. S., 1220; Ex parte South, 3 Swanst. 393; Burn v. Carvalho, 4 Mylne & C. 702; Lett v. Morris, 4 Sim. 607; Watson v. Duke of Wellington, 1 Russ. & M. 605; Yeates v. Groves, 1 Ves. 281; Lepard v. Vernon, 2 Ves. & B. 51; Ex parte Alderson, 1 Madd. 53; Collyer v. Fallon, 1 Turn. & R. 470, 475; Adams v. Claxon, 6 Ves. 230; Row v. Dawson, 1 Ves. Sen. 331; Preddy v. Rose, 3 Mer. 86, 102; Ex parte Carruthers, 3 De Gex & S. 570; Malcolm v. Scott, 3 Hare, 39; Mandeville v. Welch, 5 Wheat. 277, 286; Tiernan v. Jackson, 5 Pet. 598; Gibson v. Finley, 4 Md. Ch. 75; Wheatley v. Strobe, 12 Cal. 92, 98, 73 Am. Dec. 522; Walker v. Mauro, 18 Mo. 564; Shaver v. Western Union Tel. Co., 57 N. Y. 459, 464.

[2] Watson v. Duke of Wellington, 1 Russ. & M. 602, 605, per Sir John Leach; Lett v. Morris, 4 Sim. 607; Smith v. Everett, 4 Brown Ch. 64; Morton v. Naylor, 1 Hill, 583; Grain v. Aldrich, 38 Cal. 514, 99 Am. Dec. 423.

(a) The text is cited and followed in The Elmbank, 72 Fed. 610; Rivers v. A. & C. Wright Co., 117 Ga. 81, 43 S. E. 499.

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[1] The same conception is shown in the jurisdiction which equity exercises over the *persons* of those who are *non sui juris*, such as infants, lunatics, etc. Although the jurisdiction, when existing, extends over the persons, the *fact* upon which it rests, and which is the necessary occasion for its exercise, is the existence of *property* belonging to the person. An infant, for example, cannot be made a ward of the court merely because he is an infant, but because he is an infant possessing property which the court can administer.

(a) The text is quoted in Sharon v. Tucker, 144 U. S. 542, 12 Sup. Ct. 720, by Field, J.

tain species of these belong to the exclusive jurisdiction, and the doctrines and rules which regulate their administration constitute a large portion of the equity jurisdiction. I shall complete my survey of the exclusive jurisdiction by enumerating these kinds of remedies which are commonly administered, and which are susceptible of a definite classification and arrangement. They may be grouped according to their nature and objects in the following classes.

§ 171. 1. The first class embraces those remedies which are wholly ancillary or provisional; which do not either directly or indirectly affect the nature of any primary right, but are simply means and instruments by which primary rights may be more efficiently preserved, protected, and enforced in judicial proceedings. This class includes the ordinary preventive injunction, receivers, and interpleader.[a] 2. The second class embraces those remedies which operate *indirectly* to establish or protect primary rights, either legal or equitable. They do not expressly nor directly declare, establish, and enforce the ultimate right, estate, or interest of the complaining party; but their object is to perfect and complete the means by which such right, estate, or interest is evidenced or secured,— the title, — or to remove obstacles which hinder the enjoyment of such right.[b] They are therefore in their nature not final remedies, but are often granted as preliminary to the final relief by which the party's primary right, estate, or interest is established and enforced. The important remedies contained in this class are re-execution of instruments, reformation of instruments,[c] surrender or discharge of instruments,

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(a) The text is cited in Vila v. Grand Island E. L., I. & C. S. Co. (Nebr.), 97 N. W. 613 (ancillary character of the remedy of appointing a receiver); Freer v. Davis, 52 W. Va. 1, 43 S. E. 164, 94 Am. St. Rep. 895, 59 L. R. A. 556 (ancillary character of the remedy of injunction to restrain trespass).

(b) Quoted in Sharon v. Tucker, 144 U. S. 542, 12 Sup. Ct. 720, by Field, J., a suit to establish, as a matter of record, a title depending on prescription.

(c) The text is cited in Bickley v. Commercial Bank of Columbia, 43 S. C. 528, 21 S. E. 886.

and cancellation or rescission. 3. The third class embraces those remedies by which a primary right of property, estate, or interest is *directly* declared, established, acquired or enforced; and they often consist in the conveyance by defendant of a *legal* estate, corresponding to the complainant's equitable title. These remedies deal directly with the plaintiff's right of property, and grant to him the *final* relief which he needs, by establishing and enforcing such right. The particular remedies properly belonging to this class may assume an almost unlimited variety of forms, since their form depends upon and corresponds to the nature of the primary right to be established, and of the subject-matter over which that right extends; it is chiefly in its relation with this class that the peculiarly *elastic* quality of the equity remedial system is found. The remedies belonging to the class may, for purposes of clearer description, be again subdivided into three principal groups. Some are simply *declarative;* that is, their main and direct object is to declare, confirm, and establish the right, title, interest, or estate of the plaintiff, whether legal or equitable; they are usually granted in combination with others, and often need other kinds of relief as a preliminary step to making them efficient; as, for example, a preliminary reformation, re-execution, or cancellation.[d] Others are *restorative,* or those by which the plaintiff is restored to the full enjoyment of the right, interest, or estate to which he is entitled, but the use and enjoyment of which has been hindered, interfered with, prevented, or withheld by the wrongdoer. These also are often granted in combination with other kinds of relief, and frequently need some other preliminary equitable remedy, such as cancellation or reformation, to remove a legal obstacle to the full enjoyment of the plaintiff's right, and to render them efficient in restoring him to that

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(d) This paragraph of the text is cited in Bohart v. Chamberlain, 99 Mo. 622, 13 S. W. 85, decree establishing the existence of a lost instrument; Sharon v. Tucker, 144 U. S. 542, 12 Sup. Ct. 720.

enjoyment. Others are remedies of *specific performance*, or those by which the party violating his primary duty is compelled to do the very acts which his duty and the plaintiff's corresponding primary right require from him. The following particular instances are examples of the remedies belonging to this general class: Establishing and quieting title and possession of land; establishing some general right ("bills of peace"); establishing wills;[e] construing wills and determining the rights under them of devisees and legatees,[f] establishing disputed boundaries; redeeming lands or chattels from mortgages, pledges, and thus establishing the plaintiff's right of property and possession therein; strict foreclosure of mortgages; specific performance of contracts and of other similar obligations; performance of duties arising from implied trusts, resulting or constructive, by compelling a conveyance of the legal title; performance of the duties arising from express trusts, by compelling the trustee to fulfill the trust according to its terms; and numerous other cases of the same nature. 4. A fourth class embraces those remedies which establish and enforce liens and charges *on* property, rather than rights and interests *in* property, either by means of a judicial sale of the property itself which is affected by the lien and a distribution of its proceeds, or by means of a sequestration of the property, and an appropriation of its rents, profits, and income, until they satisfy the claim secured by the lien.[g] The important examples are: The foreclosure of mortgages of land or of chattels, and of pledges, by a sale and application of the proceeds; the similar enforcement of grantors'

(e) This paragraph of the text was cited in In re Cilley, 58 Fed. 977, 986, where, however, it was held that a proceeding to establish a will was not a "suit at common law or in equity" within the meaning of the statute authorizing removal to a federal court on the ground of diverse citizenship.

(f) The text is cited in Matthews v. Tyree, 53 W. Va. 298, 44 S. E. 526.

(g) The text is quoted in Knapp, Stout & Co. v. McCaffrey, 178 Ill. 107, 69 Am. St. Rep. 290, 52 N. E. 898 (enforcing lien of bailee in equity).

or vendees' liens on land; the enforcement of mechanics' and other like statutory liens;[h] the enforcement of charges created by will and other equitable liens; creditors' suits to enforce the equitable liens of judgment creditors and other similar liens on the assets of debtors, and the like. 5. A fifth class contains certain special remedies which do not belong to the original jurisdiction of chancery, but are wholly the results of statutory legislation. Among them are suits to set aside wills; suits to establish or to destroy some kinds of official *status,* as proceedings against corporations and their officers, brought by stockholders or creditors or officials on behalf of the state, to dissolve and wind up the corporations, and to remove or institute corporation officers, and the like; and suits for divorce absolute and limited, and for alimony, in many of the states. 6. The last class comprises proceedings in which jurisdiction is exercised over persons not *sui juris,*— infants, persons *non compotes mentis,* confirmed drunkards. The foregoing six general classes include all the important species, and most of the particular instances of the remedies which belong to the exclusive jurisdiction, those which are administered alone by courts of equity.

§ 172. When, under what circumstances, for what purposes, to what extent, and with what limitations and restrictions these remedies, or any one of them, will actually be granted to and against litigant parties, are questions which do not belong to a statement of the equitable *jurisdiction;* they belong alone to the equity *jurisprudence,* and their answer involves, to a large extent, a discussion of its doctrines and rules. The administration of those purely equitable remedies is the judicial function which marks and fixes one branch of the exclusive jurisdiction; the determination of the scope and extent of that jurisdiction only requires a knowledge of what these remedies *are,* and not of the par-

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(h) The text is cited in Hibernia Savings & Loan Society v. London & Lancashire Fire Ins. Co., 138 Cal. 257, 71 Pac. 334 (jurisdiction to enforce judgment lien against property of decedent).

ticular circumstances under which they will be conferred. In a word, all cases in which the purely equitable remedies are granted fall within the exclusive jurisdiction of equity; what those cases are constitutes a large portion of the equity jurisprudence, and is ascertained only by an application of its principles, doctrines, and rules.[a]

SECTION III.

THE CONCURRENT JURISDICTION.

ANALYSIS.

§§ 173, 174. What embraced in the concurrent jurisdiction; inadequacy of legal remedies defined.
§ 175. The remedies given must be legal in their nature.
§§ 176–179. General principle; when no concurrent jurisdiction exists.
§§ 177, 178. Examples of such cases.
§ 179. Where a law court has first taken cognizance of a case.
§ 180. General principle; where concurrent jurisdiction does exist.
§ 181. Rule *first*. Where equity has jurisdiction for any partial purpose, it may retain the cause for all purposes.
§ 182. Rule *second*. Where equity originally had jurisdiction, and the law subsequently acquires jurisdiction over the same matter, the equity jurisdiction still continues.
§ 183. Effect of the reformed procedure upon the equity jurisdiction.
§§ 184–189. Enumeration of the principal matters over which the concurrent jurisdiction ordinarily extends.
§ 185. Suits for the recovery of lands and of chattels.
§§ 186–188. Suits for pecuniary recoveries.
§ 188. Suits arising from accident, mistake, or fraud.
§ 189. Other special cases.

§ 173. **Description and Test.**— The Concurrent Jurisdiction, as stated in a former section in this chapter, embraces all those civil cases in which the primary right, estate, or interest of the complaining party sought to be maintained, enforced, or redressed is one which is created and is cognizable by the law, and in which the remedy conferred is also of the same kind as that administered, under the like circumstances, by the courts of law. The primary right, estate, title, or interest which is the foundation of the suit

(a) The text is cited in Brickley v. Commercial Bank of Columbia, 43 S. C. 528, 21 S. E. 886.

must be legal, or else the case would belong to the exclusive jurisdiction of equity; and the law must, through its judicial procedure, give *some* remedy of the same general nature as that given by equity; but this legal remedy is not, under the circumstances, full, adequate, and complete. The actual foundation of this *concurrent* branch of the equitable jurisdiction, the essential principle to which every instance of its exercise must finally be referred, is therefore the inadequacy, incompleteness, or insufficiency of the legal remedies which can be granted by courts of law to the litigant parties. This inadequacy or insufficiency inheres, not in the essential nature of the relief itself, but generally in the modes in which the relief is administered by courts of law, the inflexible and often arbitrary rules of legal procedure concerning parties to actions, trials, judgments, and the like. Although the exclusive jurisdiction of equity does not rest upon the inadequacy of legal remedies as its foundation, yet, as has already been said, the rules which govern its exercise, the doctrines of equity jurisprudence which guide and limit the court of chancery in its decision of causes falling within the exclusive jurisdiction, do also depend in some measure upon the insufficiency and inadequacy of the remedies granted by the law. This inadequacy of legal remedies, in its relations with the exclusive jurisdiction of equity, almost always exists in the very nature of the remedies themselves. The equitable remedies are different from and superior to those conferred by the law, and for this reason a court of equity may interfere and grant them, although the primary right, interest, or estate of the plaintiff is legal in its nature, and he might obtain *some* remedy for the violation of his right from a court of law. This is not true of the concurrent jurisdiction. The very definition of that jurisdiction assumes that the remedies administered under a given state of circumstances, by equity and by the law, are substantially the same,— recoveries of money, or of specific tracts of land, or of specific chattels. The incompleteness or insufficiency of the legal remedy upon which the concurrent equitable jurisdiction rests must therefore necessarily exist in the modes of legal procedure, its arbitrary and unbending rules, its want of elasticity and adaptability to circumstances, and all the other incidents of legal methods which often prevent them from doing full justice to the litigant parties.

§ 174.[a] The cases coming within the concurrent jurisdiction may, for purposes of convenience only, and not from any difference of principle, be arranged under two general classes. The distinguishing feature of the *first* class is the act, event, or fact which is the *occasion* of the remedial right. It contains all those cases in which the primary right violated, the estate, title, or interest to be protected, is of course legal, and the subject-matter of the suit, and the act, event, or fact which occasions the right to a remedy, *may* be brought within the cognizance of the law courts, and made the foundation of a legal action, but in respect of which the whole system of legal procedure and remedies is so partial and insufficient that complete justice can only be done by means of the equity jurisdiction. The most important acts, events, or facts which are the occasions of remedial rights, and which thus permit or require the interposition of equity in the cases composing this class, are fraud, mistake, and accident. The second class contains all the remaining cases in which the primary right to be redressed or protected is legal, and the relief is of the same kind as that given at law, but in which, from the special circumstances of the case itself, or from the inherent defects of the legal procedure, the remedy at law is inadequate, and equity assumes jurisdiction, in order to do complete justice. As mere illustrations of this class may be mentioned suits for an accounting, for contribution, and the like, in which both the legal and the equitable remedy is a recovery of money; suits for partition,[b] for admeasurement of dower,

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(a) Cited with approval in Stockton v. Anderson, 40 N. J. Eq. 488, 4 Atl. 642.

(b) This paragraph of the text is cited in Daniels v. Benedict, 50 Fed. 347 (partition).

and for settlement of boundaries, in which the relief in both courts is the obtaining possession of land; and the suits which may be maintained under peculiar circumstances for the recovery of specific chattels.

§ 175. **The Remedies Legal.**[a]— In order that a suit may fall under the concurrent jurisdiction of equity, the remedy — that is, the substantial relief obtained by the decree — must be of the same general nature as that which would be obtained by means of an action at law under like circumstances. All the general kinds of remedy, or final relief, which are possible by means of legal actions are defined with absolute certainty and fixedness. Omitting the particular species of relief obtainable through certain writs or special judicial proceedings, such as "mandamus," the writ of "prohibition," "*habeas corpus,*" the law, through its actions, is confined to three general kinds of remedies, — the obtaining possession of specific tracts of land, the obtaining possession of specific chattels, and the recovery of ascertained sums of money, either debts or damages, by way of compensation. In every case, therefore, properly belonging to the concurrent jurisdiction of equity, the final and substantial relief granted by the decree must be either an award of possession of some piece of land, or a delivery of possession of some specific chattel, including written instruments, such as deeds, which with this respect are regarded as chattels, or a pecuniary recovery.[1] While the equitable relief must be of the same general nature as that granted by the law courts, it need not be of the same external form, nor be accompanied by the same incidents. Thus where a decree in equity awards to the plaintiff, as his ultimate relief, the possession of certain land, it may, as a preliminary to and basis of such award, adjudge his estate and title — in fee, for life, or for years — in and to such land; while the judgment in an action of "ejectment" simply awards the possession, without expressly adjudicating upon the estate or title. Also, in most instances of pecuniary recoveries in equity, the money is regarded and treated as a fund, which is either awarded to the single claimant, or is distributed among the several claimants in the shares to which they are adjudged to be entitled. The cases are very few indeed in which a court of equity, in the same manner and form as a court of law, decrees the payment to the plaintiff of a sum of money *merely* as a debt or as compensatory damages.[b] Another important element of the concurrent equitable jurisdiction exists in the marked difference between the modes of procedure at law and in equity with reference to the actual rendition of final judgment and the form of such judgment. The judgment in an action at law, unaltered by modern statutes, is most truly a yea, yea, or a nay, nay; that is, it is a single, undivided award, or denial of some one of the three kinds of relief above described as alone possible; no adjustment of opposing rights, no partial relief to each of the opposing litigants, is permitted. The judgment is either for the

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[1] In respect to no other topic connected with equity has there been such confusion of treatment, and such utter lack of any consistent principle, among text-writers, as in relation to the matter of the *concurrent* jurisdiction. As illustrations: Because some purely legal rights and legal causes of action may be occasioned by fraud, accident, or mistake, many text-writers have therefore placed fraud, accident, and mistake, and everything pertaining to them, wholly within the concurrent jurisdiction of equity. Although the primary right arising therefrom may be entirely equitable, and although the remedy conferred may be one which can be administered only by a court of equity, such as reformation, cancellation, injunction, etc.,

(a) Cited with approval in State v. Donegan, 94 Mo. 66, 6 S. W. 693; Bindseil v. Smith, 61 N. J. Eq. 654, 47 Atl. 456 (jurisdiction to decree the transfer of written instruments).

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they are all, right and remedy, treated as though belonging to this branch of equity jurisdiction. In the same manner, the subject of partnership, as an entirety, is referred to this jurisdiction, although the interest to be maintained and the remedy to be obtained are wholly equitable in their nature. These instances are examples merely of a mode of treatment which fails to draw any true line of distinction between the two great departments of the equity jurisdiction.

[b] For an instance where such relief was required, and a mere personal judgment was rendered, see Baily v. Hornthal, 154 N. Y. 648, 661, 61 Am. St. Rep. 645, 652, 49 N. E. 56.

defendant wholly, that the plaintiff take nothing by his action, or for the plaintiff wholly, that he recover possession of a specified tract of land, or of a specified chattel, or that he recover a single sum of money from the defendant, or from all the defendants if there are more than one. The doctrine of set-off, by which a defendant may recover judgment for a debt against the plaintiff, is wholly of a statutory origin; and the doctrine of recoupment, by which the plaintiff's pecuniary recovery may be *lessened* by means of a claim for damages in favor of the defendant, is a very recent innovation upon the common-law methods of procedure. The modes of procedure in a court of equity have never been thus restricted. Its decree is not confined to a single adjudication for or against the defendant; but as a preliminary, and leading up to the final award in favor of either party, or even in the very final award itself being thus partially in favor of both litigants, it may make any adjustments, admit any limitations, and determine upon any cross-demands and subordinate claims which complete justice done to the parties shall require. The decree in equity can thus easily shape itself to the circumstances of each case, even when the final relief is only an award of money, or of possession of land or of chattels.[c] The instances to which the concurrent jurisdiction extends may therefore be described, in a general way, as follows: First, those cases where the primary right, interest, or estate is of course legal, and where the law gives its remedy, but

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(c) For example, although an administrator cannot, to the detriment of creditors, distributees, or legatees, discharge a debt due the estate by a cancellation of his individual liability to the debtor of the estate, yet such debtor is entitled to a credit by way of equitable set-off, where, by its allowance, justice will be done as between him and the administrator, without affecting the rights of any one except those of the administrator as heir or devisee. And where evidence of such equitable set-off has been received without objection, being thus before the court with the implied admission that the pleadings were broad enough to allow its reception, such judgment may be given upon the facts as the right of the matter required, although the defense of an equitable set-off has not been specifically pleaded; State v. Donegan, 94 Mo. 66, 6 S. W. 693.

from the superior flexibility of the equitable procedure, and the greater power of the equitable decrees to do complete justice, the relief conferred by equity, although of the same kind as that given by the law, is more efficient and complete; and secondly, those comparatively few cases where, from the arbitrary, rigid, and technical nature of its rules of procedure, the law can give no remedy at all.[2] In further treatment of this subject, I shall state the general doctrines upon which the jurisdiction rests, and which regulate all possible instances of its exercise, and shall then enumerate and explain the important and well-settled cases which come within its scope.

§ 176. **General Principle — No Concurrent Jurisdiction.** [a]— The principle may be stated in its broadest generality, that in cases where the primary right, interest, or estate to be maintained, protected, or redressed is a legal one, and a court of law can do as complete justice to the matter in controversy, both with respect to the relief granted and to the modes of procedure by which such relief is conferred, as could be done by a court of equity, equity will not interfere even with those peculiar remedies which are administered by it alone, such as injunction, cancellation, and the like, much less with those remedies which are administered both by it and by the law, and which therefore belong to its concurrent jurisdiction.[1] This principle, however, must be understood as referring to the original condition of law and equity, at a period when equity was establishing its jurisdiction, and before the remedial powers of the law courts had been extended by statutes, or enlarged by the gradual adoption of equitable notions; for, as will be more fully shown hereafter, the *present* power of the law courts to grant complete relief does not, in general, deprive equity of a jurisdiction which it had formerly acquired, because the law courts then possessed no such power.[2] But in order that the general principle may apply, the sufficiency and completeness of the legal remedy must be certain; if it is doubtful, equity may take cognizance.[3] While the concurrent jurisdiction of equity thus depends upon the inadequacy of legal remedies for the particular controversy, or for the class of cases of which the particular controversy is an instance, it is impossible to define, by any single formula, what is the adequacy or sufficiency of the remedy at law which shall prevent an exercise of the equitable jurisdiction. Instead of attempting to formulate such a comprehensive proposition, we must describe the various classes of cases in which this adequacy exists, and over which, as a consequence, the concurrent jurisdiction of equity does not extend.

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[2] As illustrations of this second class: by the ancient rules of common-law procedure, at the time when the equity jurisdiction commenced, there could be no recovery at law on a lost bond; and for the same reason, one partnership cannot maintain an action at law against another firm, when the two firms have a common member.

[1] Southampton Dock Co. v. Southampton, etc., Board, L. R. 11 Eq. 254; Collins v. Clayton, 53 Ga. 649; Craft v. Dickens, 78 Ill. 131; Dart v. Barbour, 32 Mich. 267, 271; Ross v. Buchanan, 13 Ill. 55, 58; Mason v. Piggott, 11 Ill. 85, 89; and the same doctrine applies under the reformed system of procedure: Kyle v. Frost, 29 Ind. 382; Claussen v. Lafrenz, 4 G. Greene, 224, 225–227. See also, sustaining the general principle as stated in the text, Grand Chute v. Winegar, 15 Wall. 373; Insurance Co. v. Bailey, 13 Wall. 616; Hipp v. Babin, 19 How. 271; South Eastern R'y v. Brogden, 3

(a) Cited with approval in Rogers v. Rogers, 17 R. I. 623, 24 Atl. 46.

§ 177. **Illustrations.**[a]— In all cases where the plaintiff holds or claims to have a purely legal estate in land, and

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Macn. & G. 8; Phillips v. Phillips, 9 Hare, 471; Moxon v. Bright, L. R. 4 Ch. 292; Smith v. Leveaux, 2 De Gex, J. & S. 1; Foley v. Hill, 1 Phill. Ch. 399, 2 H. L. Cas. 28.

[2] Varet v. New York Ins. Co., 7 Paige, 560, 568; King v. Baldwin, 2 Johns. Ch. 554, 17 Johns. 384, 8 Am. Dec. 415; Bromley v. Holland, 7 Ves. 3, 19, per Lord Eldon; Atkinson v. Leonard, 3 Brown Ch. 218, 224, per Lord Thurlow; Billon v. Hyde, 1 Atk. 126, per Lord Hardwicke. And see *post*, § 209.

[3] Rathbone v. Warren, 10 Johns. 587; King v. Baldwin, 2 Johns. Ch. 554, 17 Johns. 384, 8 Am. Dec. 415; Bateman v. Willoe, 1 Schoales & L. 205, per Lord Redesdale; Southampton Dock Co. v. Southampton, etc., Board, L. R. 11 Eq. 254; South Eastern R'y v. Brogden, 3 Macn. & G. 8.

[a] Cited with approval in Woodsworth v. Tanner, 94 Mo. 124, 7 S. W. 104; Rogers v. Rogers, 17 R. I. 623, 24 Atl. 46.

simply seeks to have his title adjudicated upon,[b] or to recover possession, against an adverse claimant who also relies upon an alleged legal title, there being no equitable feature of fraud, mistake, or otherwise, calling for the application of equitable doctrines or the granting of peculiar equitable reliefs, the remedy at law is adequate, and the concurrent jurisdiction of equity does not exist. A suit in equity, under its concurrent jurisdiction, will not be maintained to take the place of the action of ejectment, and to try adverse claims and titles to land which are wholly legal, and to award the relief of a recovery of possession.[1] [c] While this general doctrine is well established, still, in addition to the particular cases of disputed boundaries, partition, and assignment of dower, over which the concurrent jurisdiction may extend, and in which a remedy strictly legal may be granted, a court of equity will also confer the final relief of possession, and will decree a defendant to deliver up possession of land to the owner, when such relief is incidental to the main object of the suit, and the action is brought for some object otherwise within the equity jurisdiction.[2][d] In like manner, the concurrent juris-

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[1] Welby v. Duke of Rutland, 6 Brown Parl. C. 575 (vol. 2, p. 39, in Tomlins's ed.); Hill v. Proctor, 10 W. Va. 59, 77; Caveds v. Billings, 16 Fla. 261; Strubher v. Belsey, 79 Ill. 307; Phelps v. Harris, 51 Miss. 789, 793; Lewis v. Cocks, 23 Wall. 466, 469; Boston Diatite Co. v. Florence Mfg. Co., 114 Mass. 69, 19 Am. Rep. 310; Whitehead v. Kitson, 119 Mass. 484; Griswold v. Fuller, 33 Mich. 268; First Nat. Bank v. Bininger, 26 N. J. Eq. 345; Woodruff v. Robb, 19 Ohio, 212, 214; Wolfe v. Scarborough, 2 Ohio St. 361, 368; Wolcott v. Robbins, 26 Conn. 336; Green v. Spring, 43 Ill. 280; Roberts v. Taliaferro, 7 Iowa, 110, 112; Shotwell v. Lawson, 30 Miss. 27, 64 Am. Dec. 145; Bobb v. Woodward, 42 Mo. 482, 488; Waddell v. Beach, 9 N. J. Eq. 793, 795; Milton v. Hogue, 4 Ired. Eq. 415, 422; Pell v. Lander, 8 B. Mon. 554, 558; Doggett v. Hart, 5 Fla. 215, 58 Am. Dec. 464; Dickerson v. Stoll, 8 N. J. Eq. 294, 298; Topp v. Williams, 7 Humph. 569; Hale v. Darter, 5 Humph. 79; Hipp v. Babin, 19 How. 271, 277; Bowers v. Smith, 10 Paige, 193, 200.

(b) It must be borne in mind that cases where relief is sought to remove cloud on title belong to the exclusive jurisdiction.

(c) In the following cases, the plaintiff being out of possession, the bill was held to be an ejectment bill, and relief was refused: Fussell v. Gregg, 113 U. S. 550, 5 Sup. Ct. 631; Lacassagne v. Chapuis, 144 U. S. 119, 12 Sup. Ct. 659; Smyth v. New Orleans Canal & Banking Co., 141 U. S. 656, 12 Sup. Ct. 113; Ringo v. Binns, 35 U. S. (10 Pet.) 269; McGuire v. Pensacola City Co., 105 Fed. 677, 44 C. C. A. 670; Johnson v. Munday, 104 Fed. 594, 44 C. C. A. 64; Erskine v. Forest Oil Co., 80 Fed. 583; Eiffert v. Craps, 58 Fed. 470, 7 C. C. A. 319, 8 U. S. App. 436; Jordan v. Phillips & Crew Co., 126 Ala. 561, 29 South. 831; Morgan v. Lehman, Durr & Co., 92 Ala. 440, 9 South. 314; Ohm v. City and County of San Francisco (Cal.), 25 Pac. 155; Gage v. Mayer, 117 Ill. 632, 7 N. E. 97; Pittman v. Burr, 79 Mich. 539, 44 N. W. 951; Leininger v. Summit Branch R. Co., 180 Pa. St. 289, 36 Atl. 738; Saunders v. Racquet Club, 170 Pa. St. 265, 33 Atl. 79, 37 Wkly. Notes Cas. 130; Rogers v.

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[2] Green v. Spring, 43 Ill. 280; Roberts v. Taliaferro, 7 Iowa, 110, 112.

Rogers, 17 R. I. 623, 24 Atl. 46; New York & N. E. R. Co. v. City of Providence, 16 R. I. 746, 19 Atl. 759; Chandler v. Graham, 123 Mich. 327, 82 N. W. 814; Jones v. Fox, 20 W. Va. 370. As stated in Frost v. Walls, 93 Me. 405, 45 Atl. 287, "It is not the business of equity to try titles and put one party out and another in." A lessee out of possession cannot try in equity the right of one in possession claiming to hold under a prior lease. Weiss v. Levy, 166 Mass. 290, 44 N. E. 225. A receiver cannot maintain a bill to recover possession of land from a stranger to the equity case in which he was appointed. Coles v. Northrup, 66 Fed. 831, 14 C. C. A. 138, 30 U. S. App. 270. The mere fact that the dispute involves a question of boundary does not give jurisdiction, unless the case is one of which equity, under its established jurisdiction, has cognizance. Walker v. Leslie, 90 Ky. 642, 14 S. W. 682; Carberry v. West Virginia & P. R. Co., 44 W. Va. 260, 28 S. E. 694. In some jurisdictions it is held that where a question of title is raised in a *partition* or *foreclosure* bill, the title must be established at law. The reason given is that as to the party denying title the bill is an ejectment bill. Thus, in Osborne v. Osborne, 41 S. C. 195, 19 S. E. 494, the plaintiff in partition claimed half of the land and the defendant all of it. It was held that the issue must be tried at law. In Benoist v. Thomas, 121 Mo. 660, 27 S. W. 609, the plaintiff's title to one-half the land was undisputed, but there was a dispute between the defendants as to the other half. See also, on partition, Capell v. Moses, 36 S. C. 559, 15 S. E. 711; Marshall v. Pitts, 39 S. C. 390, 17 S. E. 831. As to foreclosure, see Loan & Exchange Bank v. Peterkin, 52 S. C. 236, 68 Am. St. Rep. 900, 29 S. E. 546.

(d) The text is quoted in Hanna v. Reeves, 22 Wash. 6, 60 Pac. 62.

Delivery of Possession as Incidental to other Relief.— Thus, in Woodsworth v. Tanner, 94 Mo. 124, 7 S. W. 104, a wife brought suit to cancel a deed to her husband, and it was held that as incidental thereto the court might decree possession. The court said: "When the suit is for some purpose within the equitable jurisdiction of the court, and that relief is granted, and possession is incidental to such relief, the court may go on, and award a writ for the possession. Having jurisdiction for one purpose, it will give full and complete relief, even to the extent of diction does not embrace suits by the legal owner to recover possession of a chattel, except in the few cases where the chattel has a certain special, extraordinary, and unique value impossible to be compensated for by damages, nor suits merely to determine the legal title to chattels between adverse claimants, where the claim of neither party involves or depends upon any equitable interest or feature. In all ordinary controversies concerning the legal ownership or possession of chattels, the common-law actions of replevin or trover furnish a complete and adequate remedy.[3] [e]

§ 178.[a] Cases in which the remedy is a mere recovery of money do not ordinarily come under the concurrent jurisdiction. Where the primary right of the plaintiff is purely legal, arising either from the non-performance of a contract or from a tort, and the money is sought to be recovered as a debt or as damages, and the right of action is not dependent upon or connected with any equitable feature or incident, such as fraud, mistake, accident, trust, accounting, or contribution, and the like, full and certain remedies are afforded by actions at law, and equity has no jurisdiction; these are cases especially within the sole cognizance of the law.[1] [b] This proposition does not state the

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[3] Bowes v. Hoeg, 15 Fla. 403, 408 (recovery of possession of a chattel); Long v. Barker, 85 Ill. 431 (to determine legal title to chattels); McCullogh v. Walker, 20 Ala. 389, 391 (to enforce a gift of a chattel, legal remedy complete); Young v. Young, 9 B. Mon. 66 (to try legal title to chattels, replevin sufficient); Comby v. McMichael, 19 Ala. 747 (to compel delivery of a chattel); Hall v. Joiner, 1 S. C. 186.

decreeing possession, and will enforce that branch of the decree." Citing Pom. Eq. Jur., § 177. But the mere fact that equitable relief, such as account, discovery, etc., is prayed, does not give jurisdiction when the right to such relief does not arise until the legal title is established. North Pennsylvania Coal Co. v. Snowden, 42 Pa. St. (6 Wright) 488, 82 Am. Dec. 530; Williams v. Fowler, 201 Pa. St. 336, 50 Atl. 969. The mere fact that a question of priority of liens arises does not authorize such relief. Cole v. Mettee, 65 Ark. 503, 67 Am. St. Rep. 945, 47 S. W. 407. Although plaintiff cannot sue at law because he has not the legal title, he cannot therefore go into equity to obtain possession unless he shows that defendants are affected by his equity. Young v. Porter, 3 Woods, 342, Fed. Cas. No. 18,171.

(e) Lawrence v. Times Printing Co., 90 Fed. 24 (books and accounts of a newspaper); Keystone Elect. L., H. & P. Co. v. Peoples' E. L., H. & P. Co., 200 Pa. St. 366, 49 Atl. 951; Jones v. MacKenzie, 122 Fed. 390 (railroad ties). "Of course the mere fact that complainants' legal remedies would prove abortive because of the insolvency of the respondents cannot impart equity to the bill." Chambers v. Chambers, 98 Ala. 454, 13 South. 674. Relief will not be awarded merely because discovery is asked when there is no averment showing its materiality or necessity. Armstrong v. Huntons, 1 Rob. (Va.) 323.

(a) Cited with approval in Bennett v. Bennett, 63 N. J. Eq. 306, 49 Atl. 501; Dargin v. Hewlitt, 115 Ala. 510, 22 South. 128.

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[1] Cochran v. Cochran, 2 Del. Ch. 17; Askew v. Myrick, 54 Ala. 30; Bellamy v. Hawkins, 16 Fla. 733; Collins v. Stephens, 58 Ga. 284; Badger v. McNamara, 123 Mass. 117; Stewart v. Mumford, 80 Ill. 192; Ward v. Peck, 114 Mass. 121; Finnegan v. Fernandina, 15 Fla. 379, 21 Am. Rep. 292; Reese v. Bradford, 13 Ala. 837; Sessions v. Sessions, 33 Ala. 522, 525; Andrews v. Huckabee, 30 Ala. 143; Maury v. Mason, 8 Port. 211; Torrey v. Camden etc. R. R., 18 N. J. Eq. 293; Heilman v. Union Canal Co., 37 Pa. St. 100, 104; Vose v. Philbrick, 3 Story, 335, 344; Howard v. Jones, 5 Ired. Eq. 75, 79, 81; Ohling v. Luitjens, 32 Ill. 23; Anderson v. Lincoln, 5 How. (Miss.) 279, 284; Abbott v. Allen, 2 Johns. Ch. 519, 7 Am. Dec. 554; Curtis v. Blair, 26 Miss. 309, 327; Johnson v. Conn. Bk., 21 Conn. 148, 157 (damages for wrongful taking of chattels); Wolf v. Irons, 8 Ark. 63, 66; Stone v. Stone, 32 Conn. 142; Coquillard v. Suydam, 8 Blackf. 24, 29; Meres v. Crisman, 7 B. Mon. 422 (damages for a tort); Lawson v. Davis, 7 Gill, 345; Perkins v. Perkins, 16 Mich. 162, 167; Bennett v. Nichols, 12 Mich. 22; Blakeley v. Biscoe, 1 Hemp. 114; Echols v. Hammond, 30 Miss. 177; Norwich R. R. v. Storey, 17 Conn. 364, 370; Fletcher v. Hooper, 32 Md. 210; Jones v. Newhall, 115 Mass. 244, 15 Am. Rep. 97.

(b) Quoted in Phipps v. Kelly, 12 Oreg. 213, 6 Pac. 707; cited in Myers v. Sierra Val. Stock & Agric. Assn., 122 Cal. 669, 55 Pac. 689.

No Jurisdiction, Ordinarily, for Mere Recovery of Damages.— In the following cases relief was refused, a sum due under a contract or damages for breach thereof being sought: Lewis v. Baca, 5 N M. 289, 21 Pac. 343; Matthews v. Matthews, 133 N. Y. 679, 31 N. E. 519; Chew v. Perkins (Md.), 31 Atl. 507. In the following actions also relief was refused: To enforce a decree for alimony granted in a foreign state. Bennett v. Bennett, 63 N. J. Eq. 306, 49 Atl. 501. To collect on a bond for maintenance. Elliott v. Elliott (N. J.), 36 Atl. 951. To recover part of the proceeds recovered in an action for tort. Kammermayer v. Helz, 107 Wis. 101, 82 N. W. 689. To enforce an unlimited liability of stockholders. Marsh v. Kaye, 168 N. Y. 196, 61 N. E. 177. In like manner, relief will be refused when a mere money recovery on a negotiable instrument is asked. Shields v. Barrow, 58 U. S. (17 How.) 130; Sioux Nat. Bank v. Cudahy Packing Co., 58 Fed. 20; McCullough v. Kervin, 49 S. C. 445, 27 S. E. 456; Jumper v. Commercial Bank, 48 S. C. 430, 26 S. E. 725. In jurisdictions where a beneficiary is allowed to sue on a contract, it entire doctrine. Even when the cause of action, based upon a legal right, does involve or present, or is connected with, some particular feature or incident of the same kind as those over which the concurrent jurisdiction ordinarily extends, such as fraud, accounting, and the like, still, if the legal remedy by action and pecuniary judgment for debt or damages would be complete, sufficient, and certain — that is, would do full justice to the litigant parties — in the particular case, the concurrent jurisdiction of equity does not extend to such case.[c] For example, whenever an action at

would seem that he should not be allowed equitable aid to recover damages. Hopkins v. Hopkins, 86 Md. 681, 37 Atl. 371. An assignee of a legal claim cannot ordinarily seek such relief in equity. "A court of equity will not entertain a bill by the assignee of a strictly legal right, merely on the ground that he cannot bring an action at law in his own name, nor unless it appears that the assignor prohibits and prevents such action from being brought in his name, or that an action so brought will not afford the assignee an adequate remedy." Hayes v. Hayes, 45 N. J. Eq. 461, 17 Atl. 634; affirmed, Hayes v. Berdan, 47 N. J. Eq. 567, 21 Atl. 339. See also Bernz v. Marcus Sayre Co., 52 N. J. Eq. 275, 30 Atl. 21. Where the assignor collects after the assignment, the assignee has an adequate remedy at law. French v. Hay, 89 U. S. (22 Wall.) 231. A receiver cannot maintain a bill against the sureties on the bond of his predecessor; Combs v. Shisler, 47 W. Va. 373, 34 S. E. 763; nor to recover from stockholders' dividends illegally paid; Hayden v. Thompson, 67 Fed. 273. A trustee under a mortgage cannot maintain a bill against a city to recover money due by the city to his mortgagor. International Trust Co. v. Cartersville I. G. & W. Co., 63 Fed. 341. For the same reason, a holder of a judgment against an insolvent corporation cannot resort to equity to compel the allowance of his claim by the receiver. Denton v. Baker, 79 Fed. 189, 24 C. C. A. 476. Likewise, where the relief sought is damages for a tort, as for trespass to land (Wiggins v. Williams, 36 Fla. 637, 18 South. 859, 30 L. R. A. 754; Rhea v. Hooper, 73 Tenn. (5 Lea) 390), or for conversion of personal property (Robertson v. McPherson, 4 Ind. App. 595, 31 N. E. 478), relief will be refused.

(c) This and the following sentence were quoted in Campbell v. Rust, 85 Va. 653, 8 S. E. 664; Buck v. Ward, 97 Va. 209, 33 S. E. 513; Chapman v. Lee, 45 Ohio St. 356, 13 N. E. 736. As stated by the United States Supreme Court: "Whenever one person has in his hands money equitably belonging to another, that other person may recover it by assumpsit for money had and received. The remedy at law is adequate and complete." Gaines v. Miller, 111 U. S. 395, 4 Sup. Ct. 426. Although a note is delivered by mistake, if only a money recovery is sought the legal remedy is adequate. Bolt v. Gray, 54 S. C. 95, 32 S. E. 148. In Boyce v. Allen, 105 Iowa, 249, 74 N. W. 948, the plaintiff conveyed property by absolaw will furnish an adequate remedy, equity does not assume jurisdiction because an accounting is demanded or needed.[2][d] nor because the case involves or arises from fraud;[3][e] nor because a contribution is sought from persons jointly indebted;[4] [f] nor even to recover money held in trust, where an action for money had and received will lie.[5] In the following cases, which are given as illustrations, the concurrent jurisdiction of equity was held not to exist, although each case presented some peculiar feature which was claimed to be equitable, and to remove it from the exclusive jurisdiction of the law: Where a judgment debtor had died, and no administrator had been appointed, a suit in equity could not be maintained by the creditor to recover the amount of his judgment;[6] to recover for work and labor done for the benefit of trust estates, a statute having authorized suits at law for the collection of such claims;[7] a suit by one executor against his co-executor to recover the plaintiff's share of the compensation allowed by the probate court and retained by the defendant;[8] a suit by a judgment creditor of a decedent, against the administrator, to recover the amount of his judgment;[9] where a mere pecuniary judgment at law against the debtor would be useless, because he is insolvent, or is a non-resident of the state, or has absconded, or for any other similar reason;[10] suit by grantee of land in possession, to recover back the purchase price, on account of the failure of the grantor's title;[11] suit by a ward against his guardian and sureties on the guardian's bond;[12] a suit to establish and enforce a mere personal debt of the defendant as a lien on his lands;[13] and in Massachusetts it is held that no suit can be maintained by the vendor against the purchaser to compel the specific performance of a contract for the sale of land, when the only relief given by the decree is the recovery of the unpaid purchase price, on the ground that exactly the same relief can always be obtained by an action at law.[14] This conclusion, however, rests upon the statutory limitations of the jurisdiction in Massachusetts, and is opposed to the general doctrines of equity jurisprudence.

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[2] Jewett v. Bowman, 29 N. J. Eq. 174; Badger v. McNamara, 123 Mass. 117; Passyunk Building Association's Appeal, 83 Pa. St. 441 (accounts are all on one side, and no discovery is prayed); Frue v. Loring, 120 Mass. 507; Ward v. Peck, 114 Mass. 121; Coquillard v. Suydam, 8 Blackf. 24, 29 (against an agent, where the agency is for a single transaction); Norwich, etc., R. R. v. Story, 17 Conn. 364, 370 (the fact that the accounts between the parties are numerous and complicated is not *alone* sufficient to give jurisdiction in equity in Connecticut); Long v. Cochran, 9 Phila. 267; Santacruz v. Santacruz, 44 Miss. 714, 720.

[3] Fraudulent misappropriation and conversion of money: Bay City Bridge Co. v. Van Etten, 36 Mich. 210; where the suit is merely to recover damages on account of the fraud: Ferson v. Sanger, Daveis, 252, 259, 261; and see Vose v. Philbrick, 3 Story, 335, 344; where a court of law had first taken jurisdiction: Glastonbury v. McDonald's Adm'r, 44 Vt. 450, 453; in general, where the legal remedy is adequate: Youngblood v. Youngblood, 54 Ala. 486; Huff v. Ripley, 58 Ga. 11; Suter v. Mathews, 115 Mass. 253.

lute deed as security. He came into equity to sue for the price. It was held that such relief could be given at law and the bill was dismissed.

(d) **Accounting.**— See Schwalber v. Ehman, 62 N. J. Eq. 314, 49 Atl. 1085; Willis v. Crawford, 38 Oreg. 522, 63 Pac. 985; Garland v. Hull, 21 Miss. (13 Smedes & M.) 76, 51 Am. Dec. 140; Dargin v. Hewlitt, 115 Ala. 510, 22 South. 128; Getman v. Dorr, 59 N. Y. Suppl. 788, 28 Misc. Rep. 654; Appeal of Pittsburgh, etc., R. R. Co., 99 Pa. St. 177. In Nordeen v. Buck, 79 Minn. 352, 82 N. W. 644, the action was held to be legal, although the examination of a long account was involved. And in Galusha v. Wendt, 114 Iowa, 597, 87 N. W. 512, it was held that mere intricacies of the calculations necessary to the determination of the amount of plaintiff's recovery do not make it an equitable action. The mere fact that the party from whom the account is sought is a receiver does not give equity jurisdiction. Hamm v. J. Stone & Sons Live Stock Co., 13 Tex. Civ. App. 414, 35 S. W. 427. In Kuhl v. Pierce County, 44 Nebr. 584, 62 N. W. 1066, a county brought suit against two sets of sureties on the bonds of a county treasurer, whose defalcations had so extended that it could not be determined during which term they had occurred. The court held that the complication was due to the laches of the county and that the right of the defendants to a jury trial could not be destroyed thereby.

(e) **Fraud.**— See Whitney v. Fairbanks, 54 Fed. 985; Andrews v. Moen, 162 Mass. 294, 38 N. E. 505; State v. Jones, 131 Mo. 194, 33 S. W. 23; Krueger v. Armitage, 58 N. J. Eq. 357, 44 Atl. 167; Polhemus v. Holland Trust Co., 59 N. J. Eq. 93, 45 Atl. 534; Shields v. McCandlish, 73 Fed. 318. In Paton v. Major, 46

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[4] Patterson v. Lane, 35 Pa. St. 275 (suit by a creditor of an insolvent corporation against the stockholders, to enforce their individual liability, where a remedy was given at law by statute); Stone v. Stone, 32 Conn. 142 (suit on implied contract against several defendants, to recover money paid out for their joint benefit).

[5] Crooker v. Rogers, 58 Me. 339.

[6] Cochran v. Cochran, 2 Del. Ch. 17. He should procure the appointment of an administrator, and proceed in law against him.

[7] Askew v. Myrick, 54 Ala. 30.

[8] Bellamy v. Hawkins, 16 Fla. 733. An action for money had and received would give a perfect remedy.

[9] Collins v. Stephens, 58 Ga. 284. An action at law against the administrator and his sureties on his bond would give complete relief if he failed to pay the judgment.

Fed. 210, the court quoted the following from Buzard v. Houston, 119 U. S. 347, 7 Sup. Ct. 249: "In cases of fraud or mistake, as under any other head of chancery jurisdiction, a court of the United States will not sustain a bill in equity to obtain only a decree for the payment of money by way of damages when the like amount can be recovered at law in an action sounding in tort or for money had and received." For a good statement of the rule, see Security Sav. & Loan Assn. v. Buchanan, 66 Fed. 799, 14 C. C. A. 97, 31 U. S. App. 244.

(f) **Contribution.**— Myers v. Sierra Val. Stock & Agric. Assn., 122 Cal. 669, 55 Pac. 689 (suit to enforce a right of contribution among stockholders, created by statute).

§ 179. **Cognizance First Taken by a Law Court.**[a]— In further limitation upon the power of equity to interfere where the primary rights, interests, or estates are legal, the doctrine is well settled that when the jurisdictions of law and of equity are concurrent, the one which first takes actual cognizance of any particular controversy ordinarily becomes thereby exclusive. If, therefore, the subject-matter or primary right or interest, although legal, is one of a class which may come within the concurrent jurisdiction of equity, and an action at law has already been commenced, a court of equity will not, unless some definite and sufficient ground of equitable interference exists, entertain a suit over the same subject-matter even for the purpose of granting reliefs peculiar to itself, such as cancellation, injunction, and much less to grant the same kind of relief which can be obtained by the judgment at law. The grounds which will ordinarily prevent the application of this doctrine, and will permit the exercise of the equitable jurisdiction in such cases, are the existence of some distinctively equitable feature of the controversy which cannot be determined by a court of law, or some fraudulent or otherwise irregular incidents of the legal proceedings sufficient to warrant their being enjoined, or the necessity of a discovery, either of which grounds would render the legal remedy inadequate. This rule results in part, in the United States, from the provisions of the national and state constitutions securing the right to a jury trial which belongs especially to the machinery of legal actions.[1] [b] In cases which are brought to procure some distinctively equitable remedy, and which therefore belong to the exclusive jurisdiction, the doctrine must be regarded as merely regulating the exercise of that jurisdiction, but in the cases which belong to the concurrent jurisdiction it must be regarded as one of the elements which determine the very existence of such jurisdiction.

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[10] Finnegan v. Fernandina, 15 Fla. 379, 21 Am. Rep. 292; Reese v. Bradford, 13 Ala. 837 (defendant out of the state); Heilman v. Union Canal Co., 37 Pa. St. 100, 104 (insolvency of defendant); Meres v. Chrisman, 7 B. Mon. 422 (defendant has absconded); Echols v. Hammond, 30 Miss. 177 (defendant non-resident or absconding).

[11] Anderson v. Lincoln, 5 How. (Miss.) 279, 284; Abbott v. Allen, 2 Johns. Ch. 519, 7 Am. Dec. 554; as to when the grantee may sue in equity, see Waddell v. Beach, 9 N. J. Eq. 793, 796.

[12] Lawson v. Davis, 7 Gill, 345.

[13] Perkins v. Perkins, 16 Mich. 162, 167; Bennett v. Nichols, 12 Mich. 22.

[14] Jones v. Newhall, 115 Mass. 244, 15 Am. Rep. 97.

(a) This paragraph of the text is cited and followed in German v. Browne, 137 Ala. 429, 34 South. 985; Sprigg v. Commonwealth Title Ins. & Tr. Co., 206 Pa. St. 548, 56 Atl. 33; Druon v. Sullivan, 66 Vt. 609, 30 Atl. 98.

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[1] Hipp v. Babin, 19 How. 271; Insurance Co. v. Bailey, 13 Wall. 616; Oelrichs v. Spain, 15 Wall. 211, 228; Grand Chute v. Winegar, 15 Wall. 373; Smith v. McIver, 9 Wheat. 532; Crane v. Bunnell, 10 Paige, 333; Bank of Bellows Falls v. Rutland & B. R. R., 28 Vt. 470, 477; Stearns v. Stearns, 16 Mass. 167, 171; Mallett v. Dexter, 1 Curt. 178; Winn v. Albert, 2 Md. Ch. 42; Nelson v. Dunn, 15 Ala. 501; Gould v. Hayes, 19 Ala. 438; Thomp-

(b) Equity will not withdraw the litigation concerning an accounting from a common-law court, unless it clearly appears that such course is necessary, in order that complete justice may be done, but will do so when the account is complicated or intricate, and in such case will restrain the legal action. Ely v. Crane, 37 N. J. Eq. 160, 564. See also Casperson v. Casperson, 65 N. J. L. 402, 47 Atl. 428; Nash v. McCathern, 183 Mass. 345, 67 N. E. 323. On the general proposition, see Sweeny v. Williams, 36 N. J. Eq. 627; Ely v. Crane, 37 N. J. Eq. 160; Newman v. Commercial Nat. Bank, 156 Ill. 530, 41 N. E. 156; Erste Sokolower Congregation v. First United, etc., Verein, 32 Misc. Rep. 269, 66 N. Y. Suppl. 356; Spiller v. Wells, 96 Va. 598, 70 Am. St. Rep. 878, 32 S. E. 46; McCalla v. Beadleston, 17 R. I. 20, 20 Atl. 11; Wilkinson v. Stuart, 74 Ala. 198.

§ 180. **General Principle — Concurrent Jurisdiction Exists.**— The propositions contained in the preceding paragraphs are all negative in their form; I shall now state the rules

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son v. Hill, 3 Serg. 167; Bumpass v. Reams, 1 Sneed, 595; Merrill v. Lake, 16 Ohio, 373, 47 Am. Dec. 377; Mason v. Piggott, 11 Ill. 85; Ross v. Buchanan, 13 Ill. 55; Hempstead v. Watkins, 6 Ark. 317, 42 Am. Dec. 696. In Grand Chute v. Winegar, 15 Wall. 373, an action at law had been brought on certain bonds issued by the municipal corporation, and the defense was set up that they had been issued fraudulently, and without authority, etc. While said action was pending, the corporation brought the suit in equity, setting up the same fraud and want of authority, and praying that the bonds might be surrendered up and canceled. The court held that although equity might have a concurrent jurisdiction, still, as the courts of law had first taken cognizance of the matter, and there was nothing to show that the defense set up, if established, would not be an adequate remedy, a court of equity could not interfere even to grant its peculiar relief of cancellation. Hunt, J., thus states the general doctrine: "It is an elementary principle of equity, that when full and adequate relief can be obtained in a suit at law, a suit in equity cannot be maintained. . . . And the result of the argument is, that whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate, and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury." In Insurance Co. v. Bailey, 13 Wall. 616, an action at law had been brought on a policy of life insurance by the executors of the person assured, and the company set up the defense that the policy had been obtained by means of fraudulent representations. The company then commenced this suit in equity to have the policy canceled on the same ground. The court held that the equity suit could not be maintained, because the jurisdiction of the law had first attached, and the question of fraud could be fully tried, and the company obtain complete relief, in the legal action then pending. In Bank of Bellows Falls v. Rutland, etc., R. R., 28 Vt. 470, an action at law had been brought against the bank to recover damages for the taking of certain property under an execution and judgment against the railway company, which the company had previously conveyed to the plaintiff in said action. The bank thereupon commenced this suit in equity, praying to have such conveyance set aside and canceled on the ground of its being fraudulent as against creditors of the railway, and to have the action at law enjoined. The court held it to be a which affirmatively define the extent and limits of the concurrent jurisdiction. The doctrine, in its most general and comprehensive form, admits the existence of the concurrent jurisdiction over all cases in which the remedy at law is not certain, complete, and sufficient. The fact that there is a legal remedy is not the criterion; that legal remedy, both in respect to its final relief and its modes of obtaining the relief, must be as efficient as the remedy which equity would confer under the same circumstances, or else the concurrent jurisdiction attaches.[1][a] In applying this doctrine, the ordi-

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well-settled doctrine that in all cases of concurrent jurisdiction the cause belongs exclusively to the tribunal which first takes cognizance of it; that the question whether the conveyance was fraudulent could be decided in the legal action, and if the defense of fraud was made out therein, the bank would obtain a complete relief, and that no special ground was shown why this rule should not apply in the present case. In Crane v. Bunnell, 10 Paige, 333, an action at law had been brought on a note payable in chattels, and the defense was set up that the note had been procured by fraudulent representations. The defendant then filed this bill in chancery, alleging the same fraud and praying to have the note canceled and the action at law enjoined. The court, admitting that it had a concurrent jurisdiction in cases of fraud, and might entertain a suit for discovery and relief, held that there was a material difference when the suit was commenced after the action at law. In such a suit the complainant might perhaps be entitled to a discovery; but he could not have the trial and decision of the controversy removed from the court of law which had first taken cognizance of it, and in which the parties could have the benefit of a jury trial.

[1] Some of the cases in which this rule is laid down, *and in which the equitable jurisdiction was spoken of by the court as being "concurrent,"* really belonged to the exclusive jurisdiction, since the reliefs sought for or obtained were those administered alone by equity; but the doctrine applies most directly to the concurrent jurisdiction, and is in fact a fundamental element of its existence; when applied to cases coming within the exclusive jurisdiction, the doctrine should be regarded merely as one of the general rules which control the administration of its purely equitable reliefs: Currier v. Rosebrooks, 48 Vt. 34, 38; Irwin v. Irwin, 50 Miss. 363, 368; Martin v. Tidwell, 36 Ga. 332, 345; Walker v. Morris, 14 Ga. 323; Keeton v. Spradling, 13 Mo. 321; State v. McKay, 43 Mo. 594, 598; Holland v. Anderson, 38 Mo. 55, 58; Livingston v. Livingston, 4 Johns. Ch. 287, 290, 291, 8 Am. Dec. 562; Wiswall v. McGovern, 2 Barb. 270; Pope v. Solomons, 36 Ga. 541, 545; Morris v. Thomas, 17 Ill. 112, 115; Hunt v. Danforth, 2 Curt. 592, 603; Carr v. Silloway, 105 Mass. 543, 549; Richardson v. Brooks, 52 Miss. 118, 123; Southampton Dock Co. v. Southampton, etc., Board, L. R. 11

[a] The text is quoted in Mack v. Latta (N. Y.), 71 N. E. 97, by Parker, C. J.

nary instances of the concurrent jurisdiction in which the final relief consists in the obtaining possession of a specific parcel of land, substantially the same as would be conferred by a court of law, are few and well defined; namely, the partition of land, the assignment of dower, and the settlement of disputed boundaries. But in addition to these three classes, the concurrent jurisdiction embraces other cases involving the ownership or enjoyment of lands, and a relief which is substantially the recovery of possession will be conferred, where the facts and circumstances are special, and the remedy at law would be doubtful, incomplete, or insufficient.[2] The same is true with respect to pecuniary relief. While the various instances in which equity will decree a recovery of money as the final remedy, and which constitute a most important part of its concurrent jurisdiction, are well ascertained and form a settled and certain remedial system, they by no means exhaust that jurisdiction; it extends to and embraces all cases of legal primary rights and causes of action for which the law furnishes no certain, adequate, and complete remedy.[3]

§ 181. **Effect of a Partial Jurisdiction.**— The concurrent jurisdiction of equity to grant remedies which are legal in cases which might come within the cognizance of the law courts is materially affected by the operation of two important principles, which are now merely stated, and which will be more fully discussed in a subsequent section. The first of these principles is, that when a court of equity has jurisdiction over a cause for any purpose, it may retain the

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Eq. 254; South Eastern R'y v. Brogden, 3 Macn. & G. 8, and cases cited; Boyce's Executors v. Grundy, 3 Pet. 210, 215; Watson v. Sutherland, 5 Wall. 74, 78; Dows v. Chicago, 11 Wall. 108, 110.

[2] See Respass v. Zorn, 42 Ga. 389; Watkins v. Owens, 47 Miss. 593, 598; Academy of Visitation v. Clemens, 50 Mo. 167; Otley v. Haviland, 36 Miss. 19.

[3] Franklin Ins. Co. v. McCrea, 4 G. Greene, 229 (decreeing payment of the amount due on a policy of insurance after a reformation of it); Hunt v. Danforth, 2 Curt. 592, 603 (recovery by a married woman of money left to her separate use); Gay v. Edwards, 30 Miss. 218, 230 (where several claimants are separately interested in the same fund, their shares unascertained); Edsell v. Briggs, 20 Mich. 429, 432; Carr v. Silloway, 105 Mass. 543.

cause for all purposes, and proceed to a final determination of all the matters at issue. For this reason, if the controversy contains any equitable feature or requires any purely equitable relief which would belong to the exclusive jurisdiction, or involves any matter pertaining to the concurrent jurisdiction, by means of which a court of equity would acquire, as it were, a partial cognizance of it, the court may go on to a complete adjudication, and may thus establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of its authority.[1] [a] The equitable feature or incident which most frequently draws a cause completely within the cognizance of equity, and enables the court to proceed to a full adjudication of all the issues and to a grant of all necessary reliefs, legal as well as equitable, is the auxiliary remedy of a discovery. It should be carefully noticed, however, that the proposition is not stated in absolute terms, as though the rule were peremptory; it is rather permissive, and is by no means universal in its operation.[2] Immediately derived from this principle, as a corollary or particular phase of it, is the doctrine that the concurrent jurisdiction of equity may be exercised over matters and causes of action which are legal, and by the granting of legal remedies, in order to avoid a multiplicity of suits. Where numerous actions at law are brought, or are about to be brought, either by the same or by different parties, all involving and requiring the decision of the same questions of law or of fact, so that the determination of one would not legally affect the others, a court of equity may, in order to do full justice to the litigants and to avoid great expense, take cognizance and adjudicate upon all the rights and confer all the remedies in one suit, although both the primary rights and the final reliefs are legal. This instance of the concurrent jurisdic-

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[1] Oelrichs v. Spain, 15 Wall. 211, 228; Hamilton v. Cummings, 1 Johns. Ch. 517; Hawley v. Cramer, 4 Cow. 717; Crane v. Bunnell, 10 Paige, 333; Rathbone v. Warren, 10 Johns. 587, 596; King v. Baldwin, 17 Johns. 384, 8 Am. Dec. 415; Bradley v. Bosley, 1 Barb. Ch. 125; Billups v. Sears, 5 Gratt. 31, 50 Am. Dec. 105; Rust v. Ware, 6 Gratt. 50, 52 Am. Dec. 100; Parker v. Kelly, 10 Smedes & M. 184; Jesus College v. Bloom, 3 Atk. 262, 263, Amb. 54; Ryle v. Haggie, 1 Jacob & W. 234, 237; Corporation of Carlisle v. Wilson, 13 Ves. 276, 278, 279; Adley v. Whitstable Co., 17 Ves. 315, 324; Pearce v. Creswick, 2 Hare, 286, 296; McKenzie v. Johnston, 4 Madd. 373; Martin v. Tidwell, 36 Ga. 332, 345; Walker v. Morris, 14 Ga. 323; Keeton v. Spradling, 13 Mo. 321; State v. McKay, 43 Mo. 594, 598; Pope v. Solomons, 36 Ga. 541, 545; cases of discovery and suit retained for complete relief: Handley's Ex'r v. Fitzhugh, 1 A. K. Marsh. 24; Sanborn v. Kittredge, 20 Vt. 632, 50 Am. Dec. 58; but see Little v. Cooper, 10 N. J. Eq. 273, 275, and Brown v. Edsall, 9 N. J. Eq. 256; Clark v. White, 12 Pet. 178, 188 (in a suit to compel delivery of instruments under an agreement, court went on and decreed defendant to repay money paid out by the plaintiff); Franklin Ins. Co. v. McCrea, 4 G. Greene, 229 (in suit to reform a policy of insurance, court went on and ordered payment of the amount

(a) Quoted in Carpenter v. Osborn, 102 N. Y. 561, 7 N. E. 823; Stickney v. Goudy, 132 Ill. 213, 23 N. E. 1034; Wiggins v. Williams, 36 Fla. 637, 18 South. 859, 30 L. R. A. 754; U. S. v. Union Pac. R'y Co., 160 U. S. 1, 16 Sup. Ct. 190; Chrislip v. Teter, 43 W. Va. 356, 27 S. E. 288. Cited with approval in Lynch v. Metropolitan El. R'y Co., 129 N. Y. 274, 26 Am. St. Rep. 523, 29 N. E. 315, 15 L. R. A. 287; Chambers v. Cannon, 62 Tex. 293; Walters v. Farmers' Bank, 76 Va. 12; Blair v. Smith, 114 Ind. 114, 5 Am. St. Rep. 593, 15 N. E. 817; Broadis v. Broadis, 86 Fed. 951; Keith v. Henkleman, 173 Ill. 137, 50 N. E. 692; Bank of Stockham v. Alter, 61 Nebr. 359, 85 N. W. 300; Fleishner v. Citizens' R. E. & I. Co., 25 Oreg. 119, 35 Pac. 174; Installment B. & L. Co. v. Wentworth, 1 Wash. St. 467, 25 Pac. 298; Freer v. Davis, 52 W. Va. 1, 43 S. E. 164, 94 Am. St. Rep. 895, 59 L. R. A. 556, dissenting opinion; Keith v. Henkleman, 68 Ill. App. 623; Richi v. Chattanooga Brewing Co., 105 Tenn. 651, 58 S. W. 646; Hagan v. Continental Nat. Bank (Mo.), 81 S. W. 171. For a full examination of this doctrine, see *post*, §§ 231-242.

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due on the policy as reformed); Mays v. Taylor, 7 Ga. 238, 244 (court went on and decreed payment of money, although an action at law would lie for a breach of contract); Brooks v. Stolley, 3 McLean, 523, 527 (in a suit for the infringement of a patent right, the court may determine matters not originally within its jurisdiction, and may grant purely legal remedies therefor; viz., the payment of sums of money stipulated under a contract for the use of the patent); Souder's Appeal, 57 Pa. St. 498, 502; Zetelle v. Myers, 19 Gratt. 62 (suit in equity must include the entire transaction; plaintiff cannot divide it, and sue in equity for a part and at law for a part); cases where damages may be awarded in a suit for specific performance: Corby v. Bean, 44 Mo. 379; Cuff v. Dorland, 55 Barb. 481; De Bemer v. Drew, 39 How. Pr. 466. See also Boyd v. Hunter, 44 Ala. 705 (decreeing payment of rent due by a tenant); People v. Chicago, 53 Ill. 424 (in suit to enjoin certain unlawful acts, all rights were settled and remedies given, although legal); Gillian v. Chancellor, 43 Miss. 437, 5 Am. Rep. 498 (final settlement of a decedent's estate); Carlisle v. Cooper, 21 N. J. Eq. 576 (complete relief in case of a private nuisance).

[2] See *post*, §§ 223–229, where the doctrine is fully examined.

tion plainly rests upon the arbitrary, unyielding, and insufficient modes of procedure in actions at law, and in the ample power of the equitable procedure to adapt its judicial proceedings and its final reliefs to the circumstances of each case, by bringing in all parties interested in a controversy, no matter how unequal their interests may be, and by awarding complete relief no matter how conditional and limited, to all these parties by means of one suit and decree.[3]

§ 182. **Effect of Jurisdiction Subsequently Acquired by the Law Courts.**[a]— The second principle, which is most important in its effects upon the modern concurrent jurisdiction, is the following: Whenever equity originally acquired jurisdiction over any particular subject-matter, right, or interest, because the law either did not recognize the existence of the right or interest, or could not furnish an adequate remedy for its protection, and the scope of the common law has since become enlarged, so that it now not only admits the particular primary right or interest to be legal, but also furnishes a legal remedy by its actions, *which may even be adequate* under ordinary circumstances, still the equitable jurisdiction is not in general thereby destroyed or lessened, although it is made to be concurrent, and although the special reasons for its continued exercise — namely, the inadequacy of the legal remedy — may no longer exist. The scope of the law and the jurisdiction of the law courts have thus been enlarged in two different modes. Since the earlier and more arbitrary condition of the law, when on that very account the equitable jurisdiction in many matters took its origin, the law itself has gradually and by the progressive judicial legislation of its courts adopted and incorporated into its jurisprudence, and thus made strictly legal, a multitude of doctrines and rules which were originally purely equitable; and especially by the invention of the theory of *implied contracts* or obligations, and the enormous development of its actions *ex æquo et bono,*—"assumpsit" and "case,"—it is now enabled to take cognizance of a great variety of subject-matters, primary rights, and causes of action, and to confer its pecuniary remedies, which are at least *reasonably* complete and sufficient, under circumstances and in judicial controversies which formerly would come alone within the equitable jurisdiction. In this class of cases, where the concurrent authority of the law has resulted from the action of the law courts in adopting equitable doctrines, and not from the compulsory action of the legislature, the general principle operates without exception, that the jurisdiction of equity still remains unaffected and unabridged, extending to the same rights, interests, and causes of action, although they are now legal, and granting the same remedies, although they are legal in their nature, and substantially identical with those given by the law courts. The courts of law have no power, by their own judicial legislation, and without any statutory interference, to abolish, curtail, or modify the jurisdiction which has once been acquired by equity. The equitable jurisdiction therefore exists, although the reasons for its exercise have nearly or quite disappeared, and the instances of its exercise in actual practice have perhaps been greatly lessened in number.[1] [b] The second mode of enlarging the jurisdiction at law has been by statute. The legislature has interfered, and has directly created a jurisdiction at law over particular subject-matters, which before did not exist in any degree, or has amplified and extended it where it was before partial and incomplete. In these instances of statutory jurisdiction at law, the general principle above stated is not so absolute in its operation, although the statutes, so far as they affect and tend to abridge the pre-existing jurisdiction of equity, are very strictly construed. The following conclusions, however, are sustained by the weight of judicial authority: Whenever the statutes conferring the new jurisdiction upon the law courts are *permissive* only, or whenever they not only contain no express prohibitory language, but also do not indicate, from all their provisions taken together, any clear intent to restrict the equitable jurisdiction, that jurisdiction remains unaffected, and may still be exercised, even though the rights protected and the remedies conferred have by the statutes been made legal, and a relief ordinarily sufficient, even amply sufficient and complete, may be obtained through the actions at law.[2] [c] But the effect depends

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[3] Huntington v. Nicoll, 3 Johns. 566; Livingston v. Livingston, 6 Johns. Ch. 497, 10 Am. Dec. 353; Eldridge v. Hill, 2 Johns. Ch. 261; West v. Mayor of N. Y., 10 Paige, 539; New York & N. H. R. R. v. Schuyler, 17 N. Y. 592, 34 N. Y. 30; McHenry v. Hazard, 45 N. Y. 580; Thompson v. Engle, 4 N. J. Eq. 271; Hughlett v. Harris, 1 Del. Ch. 349; Youngblood v. Sexton, 32 Mich. 406, 20 Am. Rep. 654; Mayor of York v. Pilkington, 1 Atk. 282, 283, per Lord Hardwicke; Weale v. West Middlesex, etc., Co., 1 Jacob & W. 358, 369, per Lord Eldon; Whaley v. Dawson, 2 Schoales & L. 367, 370, per Lord Redesdale; Supervisors v. Deyoe, 77 N. Y. 219, 225.

(a) See *post*, §§ 276–281, where this subject is more fully discussed.

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[1] Collins v. Blantern, 2 Wils. 341, 350, per Wilmot, C. J.; Atkinson v. Leonard, 3 Brown Ch. 218, 224; Harrington v. Du Chatel, 1 Brown Ch. 124; Bromley v. Holland, 7 Ves. 3, 19–21; Kemp v. Prior, 7 Ves. 237, 249, 250; East India Co. v. Boddam, 9 Ves. 464, 468, 469; Ex parte Greenway, 6 Ves. 812; Varet v. N. Y. Ins. Co., 7 Paige, 560, 568, per Walworth, C.; King v. Baldwin, 2 Johns. Ch. 554, 17 Johns. 384, 8 Am. Dec. 415; Rathbone v.

(b) The text is cited in Hoge v. Fidelity Loan & Trust Co. (Va.), 48 S. E. 494, limiting the exercise of this principle in the case where a defense, originally equitable, has become legally cognizable, and a judgment is sought to be enjoined because of such defense.

Warren, 10 Johns. 587; Viele v. Hoag, 24 Vt. 46; Wells v. Pierce, 27 N. H. 503, 512, 513; Smith v. Hays, 1 Jones Eq. 321; Miller v. Gaskins, 1 Smedes & M. 524; Burton v. Hynson, 14 Ark. 32; Force v. City of Elizabeth, 27 N. J. Eq. 408; People v. Houghtaling, 7 Cal. 348, 351; Heath v. Derry Bk., 44 N. H. 174; Irick v. Black, 17 N. J. Eq. 189, 199.

[2] Lane v. Marshall, 1 Heisk. 30, 34; State v. Alder, 1 Heisk. 543, 547. As examples, statutes authorizing a party to any action to call the opposite party as a witness have been held not to deprive equity of its jurisdiction to entertain suits for discovery: Cannon v. McNab, 48 Ala. 99; Millsaps v. Pfeiffer, 44 Miss. 805; *per contra*, Riopelle v. Doellner, 26 Mich. 102, and Hall v. Joiner, 1 S. C. 186. And it has been held that statutes giving law courts jurisdiction to grant some special relief in cases of fraud or mistake did not abridge the like jurisdiction which had existed in equity: Babcock v. McCamant, 53 Ill. 214, 217; Dorsey v. Reese, 14 B. Mon. 127. Statutes authorizing defenses to be set up in bar of actions at law on gaming, illegal, and usurious contracts have not generally been regarded as affecting the

(c) The text is cited to this effect in Black v. Boyd, 50 Ohio St. 46, 33 N. E. 207, holding that equity jurisdiction in matters of mutual and complicated accounts is not abrogated by section 5130, Rev. Stat. Ohio, providing that either party may demand a jury trial of "issues of fact arising in actions for the recovery of money only."

upon the legislative intent. If the statute is expressly prohibitory upon the equity courts, or if it shows a clear and certain intent that the equitable jurisdiction is no longer to be exercised over the matters within the scope of the enactment, then such jurisdiction of equity in the particular class of cases must be considered as virtually abrogated.[3] [d] The two principles stated in this and the preceding paragraphs apply also to the exclusive jurisdiction, as rules regulat-

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pre-existing jurisdiction of equity over the same class of agreements: Day v. Cummings, 19 Vt. 496; Fanning v. Dunham, 5 Johns. Ch. 122, 9 Am. Dec. 283; Wistar v. McManes, 54 Pa. St. 318, 327, 93 Am. Dec. 700; West v. Beanes, 3 Har. & J. 568; Gough v. Pratt, 9 Md. 526; Thomas v. Watts, 9 Md. 536; White v. Washington's Ex'r, 5 Gratt. 645; Lucas v. Waul, 12 Smedes & M. 157; Humphries v. Bartee, 10 Smedes & M. 282, 295. Statutes giving jurisdiction over matters of dower to the probate court do not interfere with the jurisdiction of equity: Jones v. Jones, 28 Ark. 19. Statutes giving law courts power to entertain actions on lost instruments: Hardeman v. Battersby, 53 Ga. 36; Bright v. Newland, 4 Sneed, 440, 442. Statute permitting action at law to recover a partnership debt out of estate of deceased partner: Waldron v. Simmons, 28 Ala. 629. Statutes giving a garnishment process against debtors, etc., of the principal debtor do not interfere with pre-existing equitable jurisdiction: King v. Payan, 18 Ark. 583, 587, 588; Crain v. Barnes, 1 Md. Ch. 151; Payne v. Bullard, 23 Miss. 88, 90, 55 Am. Dec. 74. Statutes giving actions at law against or in favor of married women: Mitchell v. Otey, 23 Miss. 236, 240. Statute permitting assignee of a thing in action to sue at law in his own name: Dobyns v. McGovern, 15 Mo. 662, 668. Statute permitting the defense at law of failure of consideration on a bond or note, etc.: Case v. Fishback, 10 B. Mon. 40, 41. And see, with regard to the general doctrine, Wells v. Pierce, 27 N. H. 503, 511–513; Clark v. Henry's Adm'r, 9 Mo. 336, 339; Oliveira v. University of North Car., 1 Phill. Eq. 69, 70; Biddle v. Moore, 3 Pa. St. 161, 175, 176; Wesley Church v. Moore, 10 Pa. St. 273; Babcock v. McCamant, 53 Ill. 214, 217.

[3] See Erie Railway v. Ramsey, 45 N. Y. 637, per Folger, J., as to the effect of the provision of the code of procedure permitting all possible equitable defenses to be set up in actions at law; Schell v. Erie Railway, 51 Barb. 368; Dorsey v. Reese, 14 B. Mon. 127; Winfield v. Bacon, 24 Barb. 154; Savage v. Allen, 59 Barb. 291; Wolcott v. Jones, 4 Allen, 367; Glen v. Fowler, 8 Gill & J. 340; Brown's Appeal, 66 Pa. St. 155; Patterson v. Lane, 35 Pa. St. 275; McGough v. Ins. Co., 2 Ga. 151, 154, 46 Am. Dec. 382; Hall v. Joiner, 1 S. C. 186; Askew v. Myrick, 54 Ala. 30. It has been held that when a new legal right is wholly created by statute, and a legal remedy for its violation is also given by the same statute, equity has no authority to interfere with its reliefs, even though the statuory remedy is difficult, uncertain, and incomplete: Coleman v. Freeman, 3 Ga. 137; Janney v. Buel, 55 Ala. 408.

(d) Quoted in Phipps v. Kelly, 12 Oreg. 213, 6 Pac. 707.

ing the administration of strictly equitable remedies, but they are of far greater importance in their application to the concurrent jurisdiction, and aid in fixing its extent, and in determining when courts of equity have power to grant remedies strictly legal, for the purpose of maintaining or redressing legal primary rights and interests.

§ 183. **Effect of the Reformed Procedure.**— The reformed system of procedure which now prevails in more than half of the American commonwealths, in England, and in the most important dependencies of the British empire, has also profoundly affected the scope of the concurrent jurisdiction, in one direction practically enlarging, in another practically lessening it. The fundamental principle of this reformed system is, that all distinctions between legal and equitable actions are abolished, the one "civil action" is the single judicial means for enforcing all rights in a court clothed with both jurisdictions of law and of equity in combination, and in this civil action legal and equitable primary rights, causes of action, and defenses may be united, and legal and equitable remedies may be obtained. In applying this principle, the following results have been well established: Whenever a plaintiff is clothed with primary rights, both legal and equitable, growing out of the same transaction or condition of facts which thus constituted a cause of action, and is entitled thereon to an equitable remedy, and also to a further legal remedy based upon the supposition that the equitable relief is granted, and he sets forth all these facts in his petition, and demands a judgment awarding both species of relief, the action will be sustained; the court will, in its judgment, formally grant both the equitable and the legal relief.[1][a] In these cases there is, properly considered, no joinder of different causes of action; there is only the union of different remedial rights flowing from one cause of action. Another result of the principle differs from the one just stated only in matter of form. The plaintiff, as in the last instances, is clothed with certain primary rights, both legal and equitable, arising from the same transaction or condition of facts, and is entitled to some equitable relief, and to legal relief based upon the assumption that the former relief is awarded; he avers all the necessary facts in his complaint or petition, and demands both the remedies to which he is entitled, or perhaps only the legal remedy. The court, instead of formally conferring the specific equitable remedy, and then proceeding to grant the ultimate legal remedy, may treat the former as though accomplished, and render a simple common-law judgment, embracing the final legal relief which was the real object of the suit, a recovery of money or of specific real or personal property.[2] [b]

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[1] See Pomeroy on Remedies, § 78; Cone v. Niagara Ins. Co., 60 N. Y. 619, 3 Thomp. & C. 33; Anderson v. Hunn, 5 Hun, 79; Bruce v. Kelly, 5 Hun, 229, 232; Laub v. Buckmiller, 17 N. Y. 620, 626; Lattin v. McCarty, 41 N. Y. 107,

(a) Cited to this effect in Installment B. & L. Co. v. Wentworth, 1 Wash. St. 467, 25 Pac. 298; quoted in Browder v. Phinney, 30 Wash. 74, 70 Pac. 264.

109; Welles v. Yates, 44 N. Y. 525; N. Y. Ice Co. v. N. W. Ins. Co., 23 N. Y. 357, 359; Cahoon v. Bank of Utica, 7 N. Y. 486; Broiestedt v. South Side R. R., 55 N. Y. 220, 222; Davis v. Lamberton, 56 Barb. 480, 483; Brown v. Brown, 4 Rob. (N. Y.) 488, 700; Walker v. Sedgwick, 8 Cal. 398; Gray v. Dougherty, 25 Cal. 266; Henderson v. Dickey, 50 Mo. 161, 165; Guernsey v. Am. Ins. Co., 17 Minn. 104, 108; Montgomery v. McEwen, 7 Minn. 351. But *per contra*, in Wisconsin: Supervisors v. Decker, 30 Wis. 624, 626–630; Noonan v. Orton, 21 Wis. 283; Horn v. Luddington, 32 Wis. 73.

[2] See Pomeroy on Remedies, § 80; Cone v. Niagara Fire Ins. Co., 60 N. Y. 619, 3 Thomp. & C. 33; Bidwell v. Astor Ins. Co., 16 N. Y. 263, 267; Phillips v. Gorham, 17 N. Y. 270; Caswell v. West, 3 Thomp. & C. 383; Sternberger v. McGovern, 56 N. Y. 12, 21; McNeady v. Hyde, 47 Cal. 481, 483; N. Y. Ice Co. v. N. W. Ins. Co., 23 N. Y. 337, 359; Graves v. Spier, 58 Barb. 349, 383. See also Marquat v. Marquat, 12 N. Y. 336; Barlow v. Scott, 24 N. Y. 40, 45; Cuff v. Dorland, 55 Barb. 481; Herrington v. Robertson, 7 Hun, 368; White v. Lyons, 42 Cal. 279; Foster v. Watson, 16 B. Mon. 377, 387; Leonard v. Rogan, 20 Wis. 540; Pomeroy on Remedies, §§ 81, 82.

(b) This rule is well illustrated in the case of Browder v. Phinney, 30 Wash. 74, 70 Pac. 264. A complaint stated facts which would have entitled the plaintiff to specific performance of a contract to make a written lease, by reason of his acts of part performance, but the only relief demanded was damages for his eviction. *Held*, error to dismiss the action on the ground that relief could only be granted in equity. See also Westerfelt v. Adams, 131 N. C. 379, 42 S. E. 823 (recovery in ejectment on an equitable title).

It is plain from the foregoing rules of the reformed procedure that a court clothed with full equity powers may, by means of a suit equitable in its form, and requiring the determination of equitable primary and remedial rights, also adjudicate upon rights and award remedies strictly legal, which might be adjudicated upon and awarded in an action at law; and this is the essential feature of the concurrent jurisdiction. While the doctrines of the reformed procedure thus operate to enlarge the concurrent jurisdiction, the further doctrine that equitable defenses may be set up in actions purely legal *practically* produces a contrary result, by greatly lessening the number of instances in which the interposition of equity courts is necessary to accomplish the ends of justice. In theory, however, this admission of equitable defenses has been held not to have curtailed or affected the pre-existing equity jurisdiction. This question is most intimately connected with the subject of injunctions to restrain actions or judgments at law, and its discussion is therefore postponed to a subsequent section.[c]

§ 184. **The Principal Matters within the Concurrent Jurisdiction.**— Having thus stated the doctrines which affect in a general manner the concurrent jurisdiction of equity, I shall now proceed to enumerate and briefly to explain the various classes of cases which constitute the ordinary and well-settled instances of that jurisdiction. These instances will be arranged into groups according to the nature of the final relief obtained, which is, of course, *essentially* the same as that conferred at law under like circumstances, namely: 1. Those in which the relief is substantially the recovery of possession, or the establishment of a right to the possession, of land; 2. Those in which the relief is the recovery of possession or delivery of specific chattels or written instruments; and 3. Those in which the relief is pecuniary, the recovery of or obtaining of money. This classification, although generally practicable, is not absolutely perfect. In a few cases the particular exercises of the concurrent equitable jurisdiction, depending upon the same principles and controlled by the same rules, may include both a recovery of specific chattels and of money, as in the enforcement of gifts *causa mortis*.

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[c] See further, §§ 353–358, 1366–1374.

§ 185. 1. Under the first of these classes, where the final relief is substantially a recovery or obtaining possession of specific portions of land, the concurrent jurisdiction is clearly established, and its exercise is a matter of ordinary occurrence, in suits for the partition of land among joint owners or owners in common;[1] in suits for the assignment or admeasurement of dower;[2] and in suits for the adjustment of disputed boundaries,[3] [a] where some equitable incident or feature is involved, and the dispute is not wholly confined to an assertion of mere conflicting legal titles or possessory rights.[b] 2. Under the second class, where the final relief is substantially a recovery of chattels, the jurisdiction embraces suits to compel the restoration or delivery of possession of specific chattels of such a peculiar, uncommon, or unique character that they cannot be replaced by means of money, and are not susceptible of being compensated for by any practicable or certain measure of damages, and in respect of which the legal actions of replevin, detinue, or trover do not furnish a complete remedy.[4] [c] This particular exercise of the jurisdiction extends, for like reason, to suits to compel the delivery of deeds, muniments of title, and other written instruments, the value of which cannot, with any reasonable certainty, be estimated in money.[5] [d] The equitable jurisdiction in these cases really rests upon the fact that the only relief which the plaintiff can have is the possession of the *identical* thing, and this remedy cannot *with certainty* be obtained by any common-law action. In the same class must be placed suits, which are maintainable, under some special circumstances, for the partition of chattels, analogous to those for the partition of land.[e]

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[1] Jeremy's Eq. Jur. 303–306; Fonblanque on Equity, 18–22 (35–39); Agar v. Fairfax, 17 Ves. 533, 2 Lead. Cas. Eq. 865–919, and notes thereon; 1 Spence's Eq. Jur. 653, 654.

[2] Jeremy's Eq. Jur. 306; Fonblanque on Equity, 22–24 (39, 40); 1 Spence's Eq. Jur. 653.

[3] Jeremy's Eq. Jur. 301, 302; Fonblanque on Equity, 21, 22 (37, 38); Wake v. Conyers, 1 Eden, 331, 2 Lead. Cas. Eq. 850–864, and note thereon; 1 Spence's Eq. Jur. 655.

(a) New York & T. Land Co. v. Gulf, W. T. & P. R. Co., 100 Fed. 830, 41 C. C. A. 87. Equity will also determine the location of a passway, when the only question is as to location. Link v. Caldwell, 59 S. W. 502, 22 Ky. L. Rep. 1041.

(b) In U. S. v. Flournoy, etc., Co., 69 Fed. 886, it was held that the United States, as trustee for Indians, can maintain a bill to oust parties occupying under illegal leases and to restrain such parties from inducing the Indians to make further leases.

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[4] Jeremy's Eq. Jur. 467–470; Fonblanque on Equity, 31 (48); Pusey v. Pusey, 1 Vern. 273; 1 Lead. Cas. Eq. 1109–1117, and note thereon; 1 Spence's Eq. Jur. 643, 644.

[5] Jeremy's Eq. Jur. 468, 469; Fonblanque on Equity, 43 (60, 61); 1 Lead. Cas. Eq., note to Pusey v. Pusey, 1113.

(c) **Recovery of Specific Chattels.**— Thus, equity has allowed a bill for the recovery of pen and pencil sketches (Lang v. Thatcher, 48 App. Div. 313, 62 N. Y. Supp. 956); of wampum belts (Onondaga Nation v. Thatcher, 29 Misc. Rep. 428, 61 N. Y. Supp. 1027; affirmed, 65 N. Y. Supp. 1014); of a cup won as a prize (Wilkinson v. Stitt, 175 Mass. 581, 56 N. E. 830); of notes, bond, mortgage, and book accounts (Bindseil v. Smith, 61 N. J. Eq. 654, 47 Atl. 456). See also Clark v. Flint, 39 Mass. (22 Pick.) 231, 33 Am. Dec. 733; Equitable Trust Co. v. Garis, 190 Pa. St. 544, 42 Atl. 1022, 49 Wkly. Notes Cas. 41. In Cushman v. Thayer Mfg. Jewelry Co., 76 N. Y. 365, 32 Am. Rep. 315, the jurisdiction was maintained to compel the transfer of corporate stock of a peculiar value to the true owner. In Dock v. Dock, 180 Pa. St. 14, 57 Am. St. Rep. 617, 36 Atl. 411, the plaintiff was allowed to recover letters written by her to her son, and by the son to plaintiff. The court said: "In the letters written by her to her son, she has a special property to prevent their publication or communication to other persons, or use for any illegal purpose by the party wrongfully in possession of them. The special right in these letters is one that can only be adequately protected in equity, and the court, having acquired jurisdiction for any part of the substantial relief sought, will go on and administer full relief as to all the matters in the bill, both the letters and the alleged copies." It was held that slaves were property of such a peculiar nature that a bill would lie for their specific recovery. Murphy v. Clark, 9 Miss. (1 Smedes & M.) 221; Hull v. Clark, 22 Miss. (14 Smedes & M.) 187; Harry v. Glover, Riley Eq. 53, 2 Hill Eq. 515; Young v. Burton, 1 McMull. Eq. 255; Bobo v. Grimke, 1 McMull. Eq. 304; Sims v. Shelton, 2 Strobh. Eq. 221; Spendlove v. Spendlove, Cam. & N. 36. It was necessary, however, that plaintiff's right be unquestionable. Martin v. Fancher, 21 Tenn. (2 Humphr.) 510. And no relief could be had when defendant did not have possession. Brown v. Goolsby, 34 Miss. 437.

Where the law provides no remedy whatever, equity may well take jurisdiction. Thus, where replevin will not lie because the goods are in the custody of a collector of internal revenue, a bill in equity is the only appropriate remedy. Pollard v. Reardon, 65 Fed. 848, 13 C. C. A. 171, 21 U. S. App. 639.

(d) **Delivery of Written Instrument.** —The text is cited and followed in Bindseil v. Smith, 61 N. J. Eq. 654, 47 Atl. 456; Kelly v. Lehigh Min. & Mfg. Co., 98 Va. 405, 81 Am. St. Rep. 736, 36 S. E. 511. See Folsom v. Mc-

§ 186. 3.[a] Under the third general class, where the final relief is pecuniary, or recovery or award of money in some form or for some purpose as the result of the preliminary determination or adjustment of primary or remedial rights which are legal, the well-settled instances of the concurrent jurisdiction are many in number and varied in kind. The following are the most important and the ones most frequently met in actual practice: In the contract of suretyship, and the relations growing out of it between sureties themselves, sureties and their principal and the creditor, the equitable jurisdiction includes suits for exoneration and for contribution, in the decision of which the principle of subrogation and marshaling of securities, and other equitable doctrines necessary to a complete adjustment of all claims and liabilities, may be invoked and enforced.[1] In the contract of partnership and the relations arising therefrom, the jurisdiction embraces suits for contribution, accounting, and pecuniary recovery necessary for the settlement of all claims which may exist between the partners themselves, or between the partnership and its members and the firm and individual creditors, all claims in fact for which the law by its actions gives no adequate remedy.[2] [b] The principle of contribution,[c] and the pecuniary recoveries depending upon it, have, in the exercise of the concurrent jurisdiction, a very wide application, and are enforced under a great variety of circumstances. The most important, comprehensive, and multiform remedy of the concurrent jurisdiction which results in pecuniary recoveries is that of accounting.[3] The variety of its uses and possible applications is practically unlimited; it can be adapted to all circumstances and relations in which an account is necessary for the settlement of claims and liabilities, and for the doing full justice to the litigant parties. Among the most common instances in which this remedy is employed by courts of equity are the ascertaining and settlement of claims and liabilities between principals and agents,[4] and between all other persons standing in fiduciary relations to each other;[5] the ascertaining and adjustment of the respective amounts of persons entitled to participate in the same fund,[d] and of the respective shares of persons subjected to some common liability; the ascertaining and adjustment of the shares of persons liable to contribute to a general average; the ascertaining and adjustment of the shares of persons liable to contribute with respect to charges of any kind upon land or other property; the appropriation of payments; the apportionment of rents;[e] and numerous other instances where a number of persons are differently interested in the same subject-matter, or are differently liable with respect to some common object.[6]

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[1] Jeremy's Eq. Jur. 517; Dering v. Earl of Winchelsea, 1 Cox, 318, 1 Lead. Cas. Eq. 120–188, and notes thereon; Aldrich v. Cooper, 8 Ves. 308, 2 Lead. Cas. Eq. 228, and notes thereon, 1 Spence's Eq. Jur. 661–664.

Cague, 29 Nebr. 124, 45 N. W. 269; Equitable Trust Co. v. Garis, 190 Pa. St. 544, 70 Am. St. Rep. 644, 42 Atl. 1022, 44 Wkly. Notes Cas. 41; Danforth's Adm'r v. Paxton, 1 Wash. St. 6, 23 Pac. 801; Bindseil v. Smith, 61 N. J. Eq. 654, 47 Atl. 456, citing the text (written instrument of transfer necessary, and damages not adequate relief); Scarborough v. Scotten, 69 Md. 137, 9 Am. St. Rep. 409, 14 Atl. 704 (recovery of notes and bills; trover and replevin inadequate). Equity may order the conveyance of a patent obtained by fraud. White v. Jones, 4 Call, 253, 2 Am. Dec. 564. In Walker v. Daly, 80 Wis. 222, 49 N. W. 812, a recovery was allowed of certificates of land location. The court held that replevin would not lie because the certificates were hereditaments.

(e) The text is quoted in Zinn v. Zinn (W. Va.), 46 S. E. 202, dissenting opinion. "Equity has exclusive jurisdiction of suits for the partition of personal property, even though the defendant denies plaintiff's title." Robinson v. Dickey, 143 Ind. 205, 52 Am. St. Rep. 417, 42 N. E. 679.

(a) Cited with approval in Stockton v. Anderson, 40 N. J. Eq. 488, 4 Atl. 642.

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[2] Jeremy's Eq. Jur. 515–517; 2 Lead. Cas. Eq. 391–429, note to Silk v. Prime, 1 Brown Ch. 138, note; 1 Spence's Eq. Jur. 664–667.

[3] Jeremy's Eq. Jur. 504–550; Fonblanque on Equity, 470–473; 1 Spence's Eq. Jur. 649–651.

(b) Equity will grant an account in settling partnership affairs. Bellinger v. Lehman, Durr & Co., 103 Ala. 385, 15 South. 600; Irwin v. Cooper, 111 Iowa, 728, 82 N. W. 757. In a suit against members of a partnership and a retiring member thereof to subject to execution property fraudulently withdrawn by the latter, a mere personal judgment against him was the proper form of equitable relief. Baily v. Hornthal, 154 N. Y. 648, 661, 61 Am. St. Rep. 645, 652, 49 N. E. 56.

(c) In Rindge v. Baker, 57 N. Y. 209, 15 Am. Rep. 475, there was an agreement between two adjoining owners to construct a party-wall. One refused to do his part, whereupon the other completed and then sued for contribution. The court said: "It is claimed that the present action is not an equitable one. The fact that it is brought for money is not decisive on that point. The real test in such an action is this: If it be brought for damages for breach of contract, it is a case at law; if it be brought for money, by way of performance of the contract, it is a case in equity."

§ 187. In the same general class of pecuniary reliefs belonging to the concurrent jurisdiction, and united together by a tie of close analogy, are suits for the recovery of legacies,[1] suits for the recovery or enforcement of donations *causa mortis*,[2] and the various suits, involving some equitable feature or incident, brought in connection with or in aid of the administration of the estates of deceased persons.[3][a] Although the administration of decedents' estates has, in this country, been committed to courts of probate, and the former jurisdiction of equity to entertain "administration bills" for the complete and final settlement of such estates does not practically even if nominally exist, still there are many special cases belonging to the concurrent jurisdiction in which suits may be brought to obtain pecuniary recoveries against executors and administrators, in the process of and connected with their work of administering and settlement.

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[4] Jeremy's Eq. Jur. 513, 514.

[5] Jeremy's Eq. Jur. 522, 523, 541–544.

[6] Jeremy's Eq. Jur. 506, 512, 519; 1 Spence's Eq. Jur. 661–664.

[1] Jeremy's Eq. Jur. 105, 537, 548; 1 Spence's Eq. Jur. 578–583.

[2] Snell's Eq. 138–144.

(d) Hunter v. U. S., 30 U. S. (5 Pet.) 173. Where a party seeks to reach a particular fund, he may obtain relief in equity. Smith v. Bates Match Co., 182 Ill. 166, 55 N. E. 69.

(e) Sears v. Hotchkiss, 25 Conn. 171, 65 Am. Dec. 557; Pittsburg, C. & St. L. R'y Co. v. Keokuk & H. Bridge Co., 68 Fed. 19, 15 C. C. A. 184, 46 U. S. App. 530; Tasker v. Ford, 64 N. H. 279, 8 Atl. 823; Colthar v. North Plainfield Tp., 39 N. J. Eq. 380; Meyer v. Saul, 82 Md. 459, 33 Atl. 539; City of Apalachicola v. Apalachicola Land Co., 9 Fla. 340, 79 Am. Dec. 284. Equity will take jurisdiction where accounts are complicated. Warner v. McMullin, 131 Pa. St. 370, 18 Atl. 1056, 25 Wkly. Notes Cas. 157; Inhab. of Cranford Tp. v. Watters, 61 N. J. Eq. 248, 48 Atl. 316; O'Connor v. Henderson Bridge Co., 95 Ky. 633, 27 S. W. 251, 983; Williams v. Allen, 32 N. J. Eq. 485; Flickinger v. Hull, 5 Gill, 60. Equity will take jurisdiction of mutual accounts. Board of Commissioners of Grant County v. McKinley, 8 Okl. 128, 56 Pac. 1044; Brewer v. Asher, 8 Okl. 231, 56 Pac. 714; Black v. Boyd, 50 Ohio St. 46, 33 N. E. 207.

§ 188. In another extensive class of suits brought to obtain pecuniary relief, and strictly belonging to the concurrent jurisdiction, the remedial right is occasioned by or in some manner connected with accident, mistake, or fraud.[1][a] These three matters play an important part throughout the entire equity jurisprudence; and all cases involving or in any manner depending upon or growing out of accident, or mistake, or fraud, have sometimes been described as belonging to the concurrent jurisdiction, since courts of law may also take cognizance of some causes of action or defenses arising from the same sources. In the classification which I have adopted, and which is far more accurate and consistent, all those cases in which the strictly equitable remedies of reformation, re-execution, cancellation, and the like, are granted on account of mistake, accident, or fraud necessarily come within the exclusive jurisdiction.[b] As these purely equitable kinds of relief are generally requisite, in order to do complete justice to the parties, where the remedial right arises from or is affected by mistake, accident, or fraud, it follows that the cases depending thereon, which properly belong to the concurrent jurisdiction, are comparatively few.[2] In truth, mistake, and especially fraud, instead of being particular source of the concurrent jurisdiction, are facts which affect the causes of action and reliefs, the primary and remedial rights constituting the whole of equity jurisprudence.

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[3] Jeremy's Eq. Jur. 537–541; 1 Spence's Eq. Jur. 578–586.

[1] Fraud, mistake, and accident, being the mere occasions of primary and remedial rights, are not in any true sense the grounds and basis of jurisdiction; the primary rights and interests, and the remedial rights, of which they are the occasion, belong to both jurisdictions. Excepting the particular case of suits to recover the amounts due upon lost bonds, bills, notes, etc., all the instances of suits arising from or based upon fraud, mistake or accident belonging to the concurrent jurisdiction might be referred to some other head of that jurisdiction, such as "accounting," "contribution," and the like.

§ 187, (a) The text is cited in Howell v. Morres, 127 Ill. 67, 19 N. E. 863 (bill for accounting against administrator of deceased trustee).

§ 188, (a) Thus, where plaintiff seeks an abatement of the price of land on the ground of fraud as to quantity, equity may grant relief. "Fraud and misrepresentation are among the elementary grounds of equitable jurisdiction and relief. Where they exist, the question of an 'adequate remedy at law' can but seldom arise. It is true that the absence of an adequate remedy at law is generally a sufficient ground of equitable jurisdiction; but it is equally true that the existence of a remedy at law cannot deprive courts of equity of jurisdiction in a matter that comes within the scope of their elementary jurisdiction." Meek v. Spracher, 87 Va. 162, 12 S. E. 397. This paragraph of the text is cited in Massie's Admr. v. Heiskell's Trustee, 80 Va. 789, 801 (mistake of fact).

§ 189. There are some other instances in which the concurrent jurisdiction is exercised, because the legal remedy is inadequate, or because, through the imperfection of the procedure at law, a legal remedy would be wholly insufficient, if not impracticable.[a] Among these the most important are suits to recover rent under some special circumstances;[1 b] suits to procure or compel a set-off which is not admissible or possible under the practice at law;[2] [c] suits by one firm against another, when both firms have a common partner, and other analogous suits which the technical legal rules, as to parties, prevented from being entertained by courts of law;[3] [d] and under peculiar circumstances, recoveries of damages by way of compensation in addition to, or even in place of, other equitable relief.[e]

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[2] 1 Spence's Eq. Jur. 622, 628, 632; Jeremy's Eq. Jur. 359, 366, 383.

[1] Fonblanque on Equity, b. 1, chap. 3, § 3, p. 156 (139).

§ 188, (b) The text is cited to this effect in Bickley v. Commercial Bank of Columbia, 21 S. C. 886, 21 S. E. 886.

§ 189, (a) When a factor deposits money collected as proceeds of sales for his principal in a bank, the principal may maintain a bill against the bank to recover the money. In such a case there is no legal remedy for the principal against the bank. Union Stock Yards Nat. Bank v. Gillespie, 137 U. S. 411, 11 Sup. Ct. 118. In Chosen Freeholders of Essex Co. v. Newark City Nat. Bank, 48 N. J. Eq. 51, 21 Atl. 185, a county was allowed to recover in equity from a bank a sum of money deposited by a former county collector in his own name.

§ 189, (b) "Rent is recoverable in equity where the remedy has become difficult or doubtful at law, or where the premises have become uncertain." Livingston v. Livingston, 4 Johns. Ch. 287, 8 Am. Dec. 562.

SECTION IV.

THE AUXILIARY JURISDICTION.

ANALYSIS.

§ 190. The auxiliary jurisdiction defined.
§§ 191-209. Of discovery.
  § 191. Definition and kinds of discovery.
  § 192. Origin of, in English and in Roman law.
§§ 193, 194. Effect of modern legislation; how far discovery proper has been abolished by statutes.
  § 195. General doctrine; when discovery will or will not be enforced.
§§ 196, 197. I. What judicial proceedings, in what courts, will be aided by discovery in equity.
§§ 198-200. II. The parties; their situation and relations to each other, in order that a discovery may be granted.
  § 198. The plaintiff.
  § 199. The defendant.
  § 200. A *bona fide* purchaser.
§§ 201-207. III. The nature, subject-matter, and objects of the discovery itself; of what the plaintiff may compel discovery, and the defendant must make discovery.
  § 201. General doctrine; of what facts discovery will be compelled.

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[2] 1 Spence's Eq. Jur. 651; 2 Lead. Cas. Eq. 1338-1347, notes to Earl of Oxford's case.

[3] 1 Spence's Eq. Jur. 641, 642.

(c) The text is cited in Fleming v. Stansell, 13 Tex. Civ. App. 558, 36 S. W. 504; Farris v. McCurdy, 78 Ala. 250.

(d) Thus, where the lessor is also one of the lessees of a joint, and not several lease, the suit may be maintained in equity. Pelton v. Place, 71 Vt. 430, 46 Atl. 63.

(e) Thus, where a party after contracting to sell land, conveys it to another, and the legal remedy is insufficient because of the Statute of Frauds, a bill in equity for damages, relying upon part performance to take the case out of the statute, may be maintained. Jervis v. Smith, 1 Hoff. Ch. 470.

§ 202. Of what kinds of facts discovery will not be compelled.
§ 203. What is privileged from discovery.
§ 204. The manner in which the defendant must make discovery.
§§ 205–207. Production and inspection of documents.
§ 208. IV. When, how far, and for whom may the answer in the discovery suit be used as evidence.
§ 209. How far the foregoing rules have been altered by statute.
§§ 210–215. Of the examination of witnesses.
§ 210. This branch of the jurisdiction described.
§§ 211, 212. I. Suit to perpetuate testimony.
§ 212. Statutory modes substituted.
§§ 213–215. II. Suits to take the testimony of witnesses *de bene esse*, and of witnesses in a foreign country.
§ 215. Statutory modes substituted.

§ 190. **Definition.**— The auxiliary jurisdiction of equity belongs entirely to the *procedure* by which rights are enforced and remedies are obtained, and is not in any manner concerned with the *reliefs* themselves which are granted, except so far as reliefs must always be indirectly affected by the procedure. Its object, scope, and functions are wholly confined to the procuring of evidence; and it consists of special judicial methods by which, under certain particular circumstances, the evidence needed in pending or anticipated litigations may be obtained. It is divided into two main branches: the first contains the modes by which the parties themselves are compelled to disclose facts and to produce documents, and thus to furnish the evidence needed by their adversaries; while the second contains the modes by which evidence of witnesses generally is procured and preserved, under particular circumstances, for which the common law made no provision.[a] The rules of the ancient common law concerning the competency of witnesses were exceedingly arbitrary, and would often work great injustice, unless their defects had been supplied by the equitable jurisdiction. In the common-law courts, prior to the modern statutory legislation, a party could not be examined as a witness, nor forced to make admissions in his pleadings, in behalf of his adversary; nor was there any

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(a) Quoted in Winter v. Elmore, 88 Ala. 555, 7 South. 250.

means in the common-law procedure of compelling a party to produce, or submit for inspection, or furnish copies of any documents or books which might be in his possession or under his control, however important they might be to the other party's cause of action or defense.[1] It was to supply this grievous defect in the ancient common-law methods that equity established the first branch of its auxiliary jurisdiction, called *discovery.*[2] In like manner the ancient common law only permitted the examination of witnesses at the very trial of a cause, and its courts had no power to take testimony upon commission in anticipation of the trial, and much less in anticipation of the bringing of an action.[3] This defect was supplied by equity in the second branch of its auxiliary jurisdiction, which provides for and regulates the examination of witnesses *de bene esse,* and the perpetuation of evidence.[4] I shall discuss these two branches separately.

DISCOVERY.

§ 191. **Discovery Defined.**[a]— In one most important sense "discovery" is not peculiar to and does not belong to the auxiliary jurisdiction. Every suit in equity brought to obtain relief is or may be most truly a suit for discovery; for the complainant may always, and generally does, by the allegations and interrogatories of his bill, call upon and force the defendant to disclose by his answer under oath facts and circumstances within his knowledge in support of the plaintiff's contention; and the plaintiff may perhaps go to the hearing, relying largely, and sometimes wholly, upon the evidence thus furnished by the compulsory admissions of the defendant's answer. This incident of chancery pleading, so entirely at variance from the common-law practice, by which the conscience of the defendant could be probed, and which was so powerful an instrument in eliciting the truth in judicial controversies, has been essentially adopted by the reformed system of procedure. Under that procedure this chancery mode of pleading for the purpose of eliciting facts as well as presenting issues has been essentially applied to all equitable suits, except those causes of action in which the defendant's admissions might expose him to criminal prosecution, penalties, and the like. But this is not the discovery now under consideration.[1] Discovery proper is, in its essential conception, merely an instrument of procedure, unaccompanied by any direct relief, but in aid of relief sought by the party in some other judicial controversy. The suit for discovery, properly so called, is a bill filed for the sole purpose of compelling the defendant to answer its allegations and interrogatories, and thereby to disclose facts within his own knowledge, information, or belief, or to disclose and produce documents, books, and other things within his possession, custody, or control, and asking no relief in the suit except it may be a temporary stay of the proceedings in another court to which the discovery relates. As soon, therefore, as the defendant in such suit has put in his answer containing a full discovery of all the matters and things which he is obliged, according to the principles and doctrines of equity on the subject, to disclose, the object of the suit has been accomplished, and the suit itself is ended; nothing remains to be done but to use this answer as evidence in the judicial proceeding to which this discovery was collateral.[2] [b] This branch of the auxiliary jurisdiction may be invoked, and the suit in equity for a discovery may be maintained, by the plaintiff in an action of law against the defendant therein, or by the defendant in an action at law against the plaintiff therein, in order to obtain evidence material to his cause of action or to his defense, as the case may be, and this is undoubtedly its most common purpose;[3] also by the defendant in a suit in equity, in the form of a cross-bill against the complainant therein, in order to obtain a disclosure of facts necessary to enable him properly to frame his answer to the original bill, or to obtain a disclosure of facts material as evidence on his behalf at the hearing upon the original bill and answer thereto;[4] and also, under some circumstances, by the moving party or petitioner in some proceeding in a court of equity to avoid the necessity or to escape the difficulty of procuring the evidence in that proceeding.[5] It is not, however, essential to a bill of discovery that it should be the *only* means which the complainant therein has of procuring evidence in support of his collateral cause of action or defense; that is, it is not necessary that the complainant should otherwise be destitute of proof or of the means of obtaining it. The bill for a discovery is proper, either when the complainant therein has no other proof than that which he expects to elicit by its means from the defendant, or when he needs the matters thus disclosed to supplement and aid other evidence which he furnishes;[6] or indeed whenever the court can fairly suppose that facts and circumstances discovered by means of the bill can be in any way material to the complainant therein in maintaining his cause of action or defense in a suit.[7] [c]

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[1] 3 Black. Com. 381, 382; Com. Dig., tit. Chancery, 3, B; Jeremy's Eq. Jur. 255; 1 Spence's Eq. Jur. 677.

[2] Ibid.

[3] 3 Black. Com. 383; Jeremy's Eq. Jur. 270.

[4] Jeremy's Eq. Jur. 255, 271, 273; 1 Spence's Eq. Jur. 681.

(a) Cited with approval in Reynolds v. Burgess Sulphite Fibre Co., 71 N. H. 332, 51 Atl. 1075, 57 L. R. A. 949, 93 Am. St. Rep. 535.

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[1] The distinction here pointed out should be most carefully observed, or else the whole subject will become confused and uncertain. Unfortunately the decisions, especially the American, while speaking of "discovery," have not always been careful to distinguish between the "discovery" which is a constant incident to the obtaining of relief in every equity suit, and the "discovery" which is a branch of the auxiliary jurisdiction, obtained in a separate suit without any relief. Rules and modes applicable alone to the latter have sometimes been spoken of as belonging to the former, and *vice versa*.

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[2] Jeremy's Eq. Jur. 257, 258; 1 Spence's Eq. Jur. 677, 678; Adam's Eq., 6th Am. ed., 20, marg. p. 89; Lady Shaftesbury v. Arrowsmith, 4 Ves. 71; Kearney v. Jeffries, 48 Miss. 343; Heath v. Erie R. R., 9 Blatchf. 316; Shotwell v. Smith, 20 N. J. Eq. 79.

[3] Ibid.

[4] See King of Spain v. Hallett, 1 Clark & F. 333; Prioleau v. United States, L. R. 2 Eq. 659; United States v. Wagner, L. R. 2 Ch. 582, L. R. 3 Eq. 724; Columbian Govt. v. Rothschild, 1 Sim. 94; Millsaps v. Pfeiffer, 44 Miss. 805.

[5] Montague v. Dudman, 2 Ves. Sr. 398, per Lord Hardwicke: "A bill of discovery lies here in aid of some proceedings in *this* court (i. e., the court of chancery), in order to deliver the party from the necessity of procuring evidence; or to aid in the proceeding in some suit relating to a civil right in a court of common law, as an action." In an ordinary suit in equity the complainant has no need to file a separate bill of discovery; since he can always obtain all possible disclosure of material facts from the defendant in *that* same suit, by means of his bill and the defendant's answer. But rules hereinafter stated, concerning the *subject-matter* of the discovery, the materiality of the facts disclosed to the plaintiff's case, what disclosures cannot be compelled, privileged communications, the production of documents, etc., are generally applicable to the discovery sought by the plaintiff in a suit

(b) Cited to this effect in Hurricane Tel. Co. v. Mohler, 51 W. Va. 1, 41 S. E. 421. Cited to the effect that the bill will lie to compel the inspection of other things than books and documents in Reynolds v. Burgess Sulphite Fibre Co., 71 N. H. 332, 339, 51 Atl. 1075, 57 L. R. A. 949, 93 Am. St. Rep. 535, 542.

§ 192. **Its Origin.**— The practice of the court of chancery to "probe the conscience" of the defendant, and to com-

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for relief, as well as to the discovery sought in a separate "suit for discovery" alone; many of the decisions cited to illustrate these rules were rendered in suits for relief. The same is true under the new practice now prevailing in England and in many of our states, by which interrogatories filed by either party to a pending suit have been substituted in place of the discovery by means of the bill and answer in the same suit, or by means of a bill and answer in a separate "discovery suit."

[6] Montague v. Dudman, 2 Ves. Sr. 398; Finch v. Finch, 2 Ves. Sr. 492; March v. Davidson, 9 Paige, 580; Many v. Beekman Iron Co., 9 Paige, 188; Leggett v. Postley, 2 Paige, 599; Deas v. Harvie, 2 Barb. Ch. 448; Seymour v. Seymour, 4 Johns. Ch. 409; Gelston v. Hoyt, 1 Johns. Ch. 54; Metler v. Metler, 19 N. J. Eq. 457; Turner v. Dickerson, 9 N. J. Eq. 140; Baxter v. Farner, 7 Ired. Eq. 239.

[7] Peck v. Ashley, 12 Met. 478; Thomas v. Tyler, 3 Younge & C. 255. The following are some of the most recent instances of the exercise of this jurisdiction by the American equity courts: Continental Life Ins. Co. v. Webb, 54 Ala. 688; Merchants' Nat. Bank v. State Nat. Bank, 3 Cliff. 201; Hoppock v. United, etc., R. R., 27 N. J. Eq. 286; French v. Rainey, 2 Tenn. Ch. 640; French v. First Nat. Bank, 7 Ben. 488; Kearney v. Jeffries, 48 Miss. 343; Heath v. Erie R. R., 9 Blatchf. 316; Buckner v. Ferguson, 44 Miss. 677; Shotwell v. Smith, 20 N. J. Eq. 79.

(c) See also Attorney-General v. Gaskill, L. R. 20 Ch. Div. 519. "While it is necessary in a bill of discovery to show that the discovery is material to the support of the party's claim asking the same and the manner in which it is material, it is not necessary to aver that the discovery is absolutely necessary or indispensable for that purpose. It will be sufficient to state and show that it is material evidence. Thus, for example, it is not necessary to allege in the bill that the plaintiff has no other pel him to make full disclosure of matters within his knowledge in all suits brought for *relief,* was coeval with the establishment of the court itself, and was one of the principal means by which it rapidly extended its general jurisdiction. The auxiliary jurisdiction to compel discovery alone without relief, in aid of proceedings at law, was somewhat later in its origin, but still was exercised at an early day. I condense a brief account of its history from the learned treatise of Mr. Spence.[1] In the reign of Edward IV. it was held that the donee in tail might have discovery of a deed, in possession of another, in aid of his title.[2] As early as the reign of Henry VI. chancery entertained jurisdiction to compel a discovery when it was needed to sustain an action at law, without reference to any equitable question. From his reign onwards, bills were entertained expressly for discovery, to enable the plaintiff to commence or prosecute proceedings at law.[3] In the reign of Queen Elizabeth the court of chancery was accustomed to retain jurisdiction of cases for the decision of purely legal questions, where the parties had resorted to the court simply for the purposes of discovery. According to Lord Coke, this practice led the common-law judges, in a case referred to them by the chancellor, to adopt a solemn resolution by way of protest, and their action caused the chancellor to abridge this exercise of the equity jurisdiction.[4] The limit thus placed upon the jurisdiction to grant relief, where the discovery is concerning matters purely legal, and no equitable features or incidents are involved in the controversy, has been generally recognized and adopted by the subsequent English chancellors. While the principles as to discovery were thus settled at an early day, the system of rules which control its exercise was established by the chancellors subsequent to Lord Nottingham. The fundamental conception of this auxiliary jurisdiction to obtain evidence by means of a suit for discovery was undoubtedly borrowed from the Roman law procedure. That law had provided *actiones interrogatoriæ* by which defendants were obliged to make answer under oath to questions propounded, and *actiones ad exhibendum* in which the decree compelled the defendant to produce some specific thing. The former class had, as it appears, become obsolete in the time of Justinian; but the general purposes, objects, and methods of the proceeding are described in the treatises and compilations of the Roman law which have survived to our own time.[5]

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[1] See 1 Spence's Eq. Jur. 677–680.

[2] 1 Spence's Eq. Jur. 678; 9 Edw. IV. 41; Bro. Abr., tit. Conscience, 3.

[3] 1 Spence's Eq. Jur. 678; 36 Henry VI. 26; Cary, 21.

witness or evidence to establish the facts of which the discovery is sought, for he is entitled to it, if it be merely cumulative evidence of material facts;" Russell v. Dickeschied, 24 W. Va. 61. "When the plaintiff has any case to make out, he has a right of discovery of anything that may assist him in proving his case, or even the smallest title of it;" Jenkins v. Bushby, 35 Law J. Ch. 400; Reynolds v. Burgess Sulphite Fibre Co., 71 N. H. 332, 51 Atl. 1075, 93 Am. St. Rep. 535, 57 L. R. A. 949. It is sufficient if it appears that the discovery is "indispensable to justice;" Handley v. Hiffin, 84 Ala. 600, 4 South. 725. "He must also show that he is justly entitled thereto, as evidence in connection with the preparation and trial of his case, and that such evidence is necessary to enable him fully to prosecute or defend the same;" Gorman v. Banigan, 22 R. I. 22, 46 Atl. 38. Where the facts are within plaintiff's knowledge, as where he seeks discovery and account from a corporation to whose books he has access, a discovery will be denied; Kane v. Schuylkill Fire Ins. Co., 199 Pa. St. 205, 48 Atl. 989. Where the bill is for discovery and relief, it has been held that it must allege that the facts are known to no other person than the defendant; Vennum v. Davis, 35 Ill. 568. But such an allegation is not necessary when the bill is filed purely for discovery in aid of a suit at law; Robson v. Doyle, 191 Ill. 566, 61 N. E. 435; Marsh v. Davison, 9 Paige, 580; Cecil Nat. Bank v. Thurber, 59 Fed. 913, 8 C. C. A. 365, 8 U. S. App. 496.

§ 193. **Effect of Modern Statutes.**[a]— Modern legislation has greatly interfered with the practical exercise of the auxiliary jurisdiction for a discovery, by introducing simpler and more efficacious methods in its stead, and by thus rendering a resort to it unnecessary and even inexpedient. The important question is, whether the suit for a discovery alone, without relief, has been directly or indirectly abolished or superseded by the recent statutes. English statutes, passed not many years since, gave full power and authority to any party to an action or proceeding at law to examine his opponent under oath as a witness;[1] and full power to the common-law courts to compel any party to an action to produce documents.[2] These permissive statutes, it was held, did not interfere with the equity jurisdiction for discovery in aid of a cause of action or defense at law.[3] More recent legislation of Parliament has gone much further. The supreme court judicature act of 1873, which consolidated all the superior courts into one tribunal having jurisdiction of all possible matters, except those purely ecclesiastical, which abolished the distinction between legal and equitable actions, and permitted all legal and equitable causes of action, defenses, and remedies to be united in one proceeding, and which provided for the examination of either party upon interrogatories at the instance of his adversary, and for the production and inspection of documents by either party at the requirement of the other, in any action, has superseded and practically put an end to, even if not directly abrogated, the suit for a discovery as a branch of the auxiliary jurisdiction of equity.[4] [b] Under this new method of obtaining discovery from the opposite party in any kind of action, and of compelling the production of documents by means of interrogatories filed during the pendency of the action by either the plaintiff or the defendant, it is held that all the doctrines and rules concerning the subject-matter of discovery and concerning the documents whose production can be compelled, which had been established by courts of equity, are still in force, and control the same matters in the new procedure.[5][c] Similar modes of procuring evidence from the opposite party by means of interrogatories have been adopted by statute in several of our states, although in none of them does the matter seem to be so carefully regulated and so efficacious as in England. Passing to the legislation of this country, the reformed procedure, which was first enacted in the Code of Civil Procedure of New York in 1848, and has now extended to more than half the states and territories of this Union, and which is identical in its fundamental principles, doctrines, and methods with the English supreme court of judicature act, has in like manner superseded and *practically,* at least, destroyed the equitable suit for discovery without any other relief, wherever the system prevails. In

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[4] 1 Spence's Eq. Jur. 678, 679; 4 Inst. 84, 85. The resolution, so far as touches this subject, was as follows: "When any title of freehold or other matter determinable by the common law comes incidentally in this court (i. e., of chancery), the same cannot be decided in chancery, but ought to be referred to the trial of the common law."

[5] Phillimore's Private Law among the Romans, 182.

[a] Cited with approval in Handley v. Hiffin, 84 Ala. 600, 4 South. 725; Chapman v. Lee, 45 Ohio St. 356, 13 N. E. 736.

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[1] 14 & 15 Vict., chap. 99, § 2.

[2] 17 & 18 Vict., chap. 125, §§ 51, 52.

[3] British Empire Ship. Co. v. Somes, 3 Kay & J. 433; Lovell v. Galloway, 17 Beav. 1. This conclusion is reached by applying the general doctrine that equity, having once acquired jurisdiction over a given subject-matter, cannot lose that jurisdiction by the mere fact that the common-law courts have also become invested with the same powers.

[4] Supreme Court of Judicature Act of 1873, 36 & 37 Vict., chap. 66, Schedule, Rules of Procedure, rules 25–27. These rules provide that in any action either party may obtain discovery from the other on oath upon interroga-

(b) As to the effect of this statute upon the equitable rule that discovery would not be compelled against a *bona fide* purchaser in aid of a legal action, see *post*, § 200. In Attorney-General v. Gaskill, L. R. 20 Ch. Div.

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tories; and that the court may order any party to discover, produce, and permit inspection of any documents, etc., in his possession or under his control, etc. In other words, everything which could be done by a bill for discovery can be accomplished in a more simple, direct, and speedy mode prescribed by the statute. The essential principles of this statute and of the system which it established for England are, as I have before stated, identical with the principles and methods of the reformed procedure prevailing in more than half of the American commonwealths.

[5] Anderson v. Bk. of Br. Columbia, L. R. 2 Ch. Div. 644; Cashin v. Craddock, L. R. 2 Ch. Div. 140; Hoffman v. Postell, L. R. 4 Ch. 673.

519, the right of discovery as existing in the court of chancery was held still to exist except so far as it is modified by the judicature acts and the general orders, and a party still has a right to exhibit interrogatories, not only for the purpose of obtaining from the opposite party information as to material facts, which are not within his own knowledge, and are within the knowledge of the opposite party, but also for the purpose of obtaining from the opposite party admissions which will make it unnecessary for him to enter into evidence as to the facts admitted.

(c) See also Attorney-General v. Gaskill, L. R. 20 Ch. Div. 519.

some of these states the suit for "discovery," properly so called, is expressly abolished by the statute; and in all of them it is utterly inconsistent with both the fundamental theory and with the particular doctrines, rules, and methods of the reformed procedure. In the other commonwealths, where the common-law and the equity jurisdictions are still preserved distinct from each other, whether possessed by the same court, or as in a very few states, by separate tribunals, the statutes permit the parties to all civil actions and proceedings, both at law and in equity, to testify in their own behalf, and to be examined as witnesses, in the ordinary manner, on behalf of their adversaries; and have also provided summary and simple modes for compelling the disclosure and production and inspection, by the parties to any action, of documents, books, and the like material, to the opposite party, for maintaining his cause of action or defense. Notwithstanding these great changes, made by statutes, which seem to remove the very foundation for any interposition by equity, it has generally been held that the legislature has not abridged nor affected the auxiliary equitable jurisdiction to entertain suits for mere discovery of evidence and production of documents, and that such equitable jurisdiction still exists, where not expressly abolished by the statutes.[6] [d] This conclusion, however, is not universal. In some cases it has been held that the legislation, by abolishing all the grounds upon which the suit for a discovery was based, has necessarily abrogated the jurisdiction itself.[7] [e] This abridgment of the technical "discovery," it should be carefully remembered, does not extend to the discovery or compelling defendants to make admissions or disclosures by means of the pleadings, in suits brought for relief.[f] In some of the states, however, which still retain the ancient common-law and equitable jurisdictions, the obtaining evidence by means of interrogatories filed in the action by either party, instead of by means of answers to allegations and questions contained in the bill or cross-bill, — substantially in accordance with the present English procedure,— has been provided for by recent statute; and this statutory change may have abrogated the mode of discovery as an incident and part of the pleadings in suits for relief, even though it may not have abolished the suit for a discovery alone without relief.

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[6] Cannon v. McNab, 48 Ala. 99; Millsaps v. Pfeiffer, 44 Miss. 805; Shotwell v. Smith, 20 N. J. Eq. 79. And see also Buckner v. Ferguson, 44 Miss. 677; Kearney v. Jeffries, 48 Miss. 343; Continental Life Ins. Co. v. Webb, 54 Ala. 688; Hoppock v. United, etc., R. R., 27 N. J. Eq. 286; French v. First National Bk., 7 Ben. 488.

(d) **Auxiliary Jurisdiction not Abridged.**— The text is cited to this effect in Wright v. Superior Court, 139 Cal. 469, 73 Pac. 145, in the dissenting opinion of Shaw, J., where the following cases are also cited, among others: Post v. Toledo, etc., Co., 144 Mass. 341, 11 N. E. 540, 59 Am. Rep. 86; Union Passenger R'y Co. v. Mayor, 71 Md. 238, 17 Atl. 933; Howell v. Ashmore, 9 N. J. Eq. 91, 57 Am. Dec. 371; Elliston v. Hughes, 1 Head (Tenn.), 227; Grimes v. Hilliary, 38 Ill. App. 246; Kendallville Refrigerator Co. v. Davis, 40 Ill. App. 616; Ames v. N. J. F. Co., 12 N. J. Eq. 68, 72 Am. Dec. 385. See further Lancey v. Randlett, 80 Me. 169, 13 Atl. 686, 6 Am. St. Rep. 169; Handley v. Hiffin, 84 Ala. 600, 4 South. 725; Shackelford v. Bankhead, 72 Ala. 476; Russell v. Dickeschied,

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[7] Riopelle v. Doellner, 26 Mich. 102. To the same effect, also, is Heath v. Erie R. R., 9 Blatchf. 316. In a suit in equity a cross-bill was filed praying discovery *and relief*. From certain proceedings and stipulations of the parties, the court held that as a bill for relief this cross-bill was unnecessary and nugatory, so that it was only a cross-bill for a discovery without relief. With respect to such a bill, the court held that the statutes of Congress, act of July 6, 1862, section 1 (12 U. S. Stats. at Large, p. 588), and act of July 2, 1864 (13 U. S. Stats. at Large, p. 351), permitting parties to be witnesses, had necessarily abrogated the equity suit for a mere discovery without relief.

24 W. Va. 61; Kelley v. Boettcher, 85 Fed. 55, 29 C. C. A. 14; Indianapolis Gas Co. v. City of Indianapolis, 90 Fed. 196; Miller v. U. S. Casualty Co., 61 N. J. Eq. 110, 47 Atl. 509; Wood v. Hudson, 96 Ala. 469, 11 South. 630; Hurricane Tel. Co. v. Mohler, 51 W. Va. 1, 41 S. E. 421; Colgate v. Compagnie Francaise du Telegraphe, 23 Fed. 82; Clark v. Rhode Island Locomotive Works, 24 R. I. 307, 53 Atl. 47; Reynolds v. Burgess Sulphite Fibre Co., 71 N. H. 332, 346, 51 Atl. 1075, 93 Am. St. Rep. 535, 550, 57 L. R. A. 949 (where discovery is essential prior to the trial). A bill for discovery against a corporation has been allowed, although all the officers are by statute made competent witnesses for either party. The court, in Continental Nat. Bk. v. Heilman, 66 Fed. 184, speaking of an objection to the jurisdiction, said: "But whatever force this suggestion might be entitled to where a discovery is sought from a natural person, it has none in such a case as the present, for the corporation cannot be sworn and examined as a witness; and it is apparent that in many cases a discovery by a corporation may be important to attain the ends of justice." To same effect, see Indianapolis Gas Co. v. City of Indianapolis, 90 Fed. 196.

(e) **Jurisdiction Abridged or Abrogated.**— The text is cited to this effect in Turnbull v. Crick, 63 Minn. 91, 65 N. W. 135. The court said: "A bill of discovery was born of necessity, for there was then no other way by which a party to an action could secure the benefit of facts within the exclusive personal knowledge of his adversary, or of documents in his exclusive possession; but the remedies provided by our Civil Code and other statutes, giving a party the right to call his adversary as a witness, and compel the production of books and documents, have swept away every ground and reason for a bill of discovery. . . . These remedies, furnished by our Reform Code of Procedure, are not simply cumulative, but abrogate bills of discovery and the practice and procedure in the former court of chancery, so far as they are inconsistent therewith." The text is also cited in Wright v. Superior Court, 139 Cal. 469, 73 Pac. 145, opinion of Van Dyke, J., but the court left the question undecided. It is sometimes said that the general rule is that discovery will not be compelled from any persons who can

§ 194.[a] It follows from the foregoing statements that the suit for a discovery, as a branch of the auxiliary jurisdic-

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be made witnesses in the cause in aid of which the discovery is sought; Reddington v. Lanahan, 59 Md. 429; Rindskopf v. Platto, 29 Fed. 130; Babbott v. Tewksbury, 46 Fed. 86; Ex parte Boyd, 105 U. S. 657; Brown v. M'Donald, 130 Fed. 964, reviewing many cases in the Federal courts; London Guarantee & Accident Co. v. Doyle, 130 Fed. 719. In Michigan it is held that "since parties have become general witnesses under our statutes, a bill of discovery will not lie where the facts sought to be discovered are within the knowledge of any witness;" McCreery v. Bay Circuit Judge, 93 Mich. 463, 53 N. W. 613; Shelden v. Walbridge, 44 Mich. 251, 6 N. W. 681. Hence such a bill is no longer allowable. In Nebraska it is held that "under the Code, discovery has ceased to be one of the objects sought in a court of equity." Lamaster v. Scofield, 5 Nebr. 148; Kuhl v. Pierce County, 44 Nebr. 584, 62 N. W. 1066. See also Chapman v. Lee, 45 Ohio St. 356, 13 N. E. 736; Preston v. Smith, 26 Fed. 884; Paton v. Majors, 46 Fed. 210; Safford v. Ensign Mfg. Co., (C. C. A.) 120 Fed. 480 (dictum); Ducktown Sulphur, Copper & Iron Co. v. Fain, 109 Tenn. 56, 70 S. W. 813.

(f) This sentence was quoted with approval in Le May v. Baxter, 11 Wash. 649, 40 Pac. 122. This point was directly decided in the case of Smythe v. Henry, 41 Fed. 715, where discovery was prayed in a suit for both equitable relief and discovery. The court said, in answer to an objection that full power to examine witnesses had been conferred upon the law courts: "The mere fact that statutes have conferred upon courts of law the power to compel parties to the record to testify as witnesses does not deprive a party in courts of the United States of the right of discovery in equity when seeking equitable relief. Such remedy is not as effectual as the equitable remedy."

(a) Cited with approval in Chapman v. Lee, 45 Ohio St. 356, 13 N. E. 736.

tion, is now confined to a portion only of the states and territories; and even in those commonwealths a resort to it is quite infrequent. For this reason, an extensive and minute discussion of the rules which govern it seems to be unnecessary. On the other hand, the principles and doctrines relating to discovery, which have been settled by courts of equity, and which determine what facts parties can be compelled to disclose, and what documents to produce, and under what circumstances the disclosure or production can be obtained, will still continue to be recognized by the courts, and to regulate their action in enforcing the examination of parties and the production of writings by means of the more summary statutory proceedings.[1] [b] The abolition or discontinuance of the technical "discovery" has not abrogated these principles and doctrines, nor dispensed with their statement, at least in a brief and condensed form.

§ 195. **General Doctrines when Discovery will be Enforced.**[a] — As this auxiliary jurisdiction was contrived to supply a great defect in the ancient common-law methods, which was a constant source of wrong to suitors at law, and as it was intended to promote right and justice, discovery was, from the outset, favored by courts of equity; and as a general doctrine, it will always be enforced, unless some recognized and well-established objection exists in the particular case to prevent or to limit its operation. This affirmative proposition is so generally true that the discussion of the subject mainly consists in stating and explaining the objections which have been established, and which alone can avail to hinder the exercise of the jurisdiction.[1] While thus made effective, the jurisdiction is also carefully guarded, so as not to infringe upon the defendant's rights. Its object is to promote justice by eliciting facts material to the plaintiff's contention; not to compel the defendant to disclose matters injurious to himself or prejudicial to his own case. While the plaintiff is sufficiently aided in establishing his own side of the controversy, the defendant is also carefully guarded. In stating the matters which are affirmatively requisite to the maintenance of a suit for discovery, and the objections which may negatively operate to defeat it, I shall divide the discussion into the following principal heads: 1. What judicial proceeding, in what courts, will be aided by "discovery" in equity; 2. The parties, their situation and relations with each other, in order that a discovery may be enforced; 3. The nature, subject-matter, and

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§ 194, [1] As illustrations, see the following cases: Anderson v. Bk. of Br. Columbia, L. R. 2 Ch. Div. 644; Cashin v. Craddock, L. R. 2 Ch. Div. 140; Hoffman v. Postill, L. R. 4 Ch. 673.

§ 195, [1] Jeremy's Eq. Jur. 257-269. In Wigram on Discovery, 21, 22, the gen-

(b) Cited to this effect in Arnold v. Pawtuxet Val. Water Co., 18 R. I. 189, 26 Atl. 55, 19 L. R. A. 602.

(a) Cited with approval in Reynolds v. Burgess Sulphite Fibre Co., 71 N. H. 332, 51 Atl. 1075, 57 L. R. A. 949, 93 Am. St. Rep. 535.

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eral principles are summed up in the following propositions: "1. It is the right, as a general rule, of the plaintiff in equity to examine the defendant upon oath as to all matters of fact which, being well pleaded in the bill, are material to the proof of the plaintiff's case, and which the defendant does not, by his form of pleading, admit. 2. Courts of equity, as a general rule, oblige a defendant to pledge his oath to the truth of his defense; with this qualification, the right of a plaintiff in equity to the benefit of the defendant's oath is limited to a discovery of such material facts as relate to the plaintiff's case; and it does not extend to the discovery of the manner in which, or of the evidence by means of which, the defendant's case is to be established, or to any discovery of the defendant's evidence." In Cooper's Eq. Pl., chap. 3, § 3, p. 189, the objections which will prevent a discovery are thus summarized: "1. That the subject is not cognizable in any municipal court of justice; 2. That the court will not lend its aid to obtain a discovery for the particular court for which it is wanted; 3. That the plaintiff is not entitled to a discovery, by reason of some personal disability; 4. That the plaintiff has no title to the character in which he sues; 5. That the value of the suit is beneath the dignity of the court; 6. That the plaintiff has no interest in the subject-matter, or title to the discovery required, or that an action will not lie for which it is wanted; 7. That the defendant is not answerable to the plaintiff, but that some other person has a right to call for the discovery; 8. That the policy of the law exempts the defendant from the discovery; 9. That the defendant is not bound to discover his own title; 10. That the discovery is not material in the suit; 11. That the defendant is a mere witness; 12. That the discovery called for would criminate the defendant." It should be observed that both these extracts relate to discovery as an incident of ordinary suits for relief, as well as to discovery proper; indeed, some passages in each can only apply to the former mode of compelling the defendant to disclose facts.

object of the discovery itself,—that is, the matters and facts of which the plaintiff in the equity suit may inquire and compel a discovery, and the defendant must answer and make discovery; 4. The defendant's answer in the discovery suit, when, how far, and by whom it may be used as evidence.

§ 196. **I. What Judicial Proceedings, in What Courts, will be Aided by Discovery in Equity.**— A suit for discovery will be maintained in aid of another cause depending in a court of equity upon a cross-bill filed for that purpose by the defendant therein;[1] and especially in aid of proceedings in any common-law court of general jurisdiction or other public tribunal of the same country which is or was by its original modes of procedure unable to compel the needed disclosure.[2] It has been said that the jurisdiction in aid of courts of law is confined to the superior courts, and does not extend to inferior courts whose jurisdiction is local or is limited as to the subject-matter.[3] It is well settled that a discovery will not be granted in aid of a controversy before arbitrators, where the submission to arbitration was the voluntary act of the parties;[4] but the reason of this rule fails, and a discovery will be compelled in aid of a compulsory reference to arbitrators or referees ordered by the court in an action.[5] Discovery has sometimes been granted, both in England and in this country, in aid of a controversy pending in a tribunal of a foreign country.[6][a]

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[1] Millsaps v. Pfeiffer, 44 Miss. 805; King of Spain v. Hullett, 1 Clark & F. 333; Prioleau v. United States, L. R. 2 Eq. 659; United States v. Wagner, L. R. 2 Ch. 582, L. R. 3 Eq. 724; Colombian Government v. Rothschild, 1 Sim. 94. But see Heath v. Erie R. R., 9 Blatch. 316, as to effect of recent statutes. It seems, also, that a bill for discovery may sometimes lie in behalf of the complaining party in another proceeding pending in a court of equity: Montague v. Dudman, 2 Ves. Sr. 398, per Lord Hardwicke.

[2] Jeremy's Eq. Jur. 268; March v. Davidson, 9 Paige, 580; Lane v. Stebbins, 9 Paige, 622; Atlantic Ins. Co. v. Lunar, 1 Sand. Ch. 91; Kearney v. Jeffries, 48 Miss. 343; Buckner v. Ferguson, 44 Miss. 677; Shotwell v. Smith, 20 N. J. Eq. 79.

[3] See Jeremy's Eq. Jur. 268, where the proposition is laid down in this broad manner excepting all inferior courts, and defining them as those whose jurisdiction is local, although otherwise general, and those whose jurisdiction is limited in any manner, giving as an illustration the ecclesiastical courts. The proposition in this broad form may well be doubted. Adams, in his treatise, states the limitation in a much different manner. He says that discovery may be enforced in aid of relief "asked from the court of chancery, or from another public tribunal, in this country, *which is itself unable to enforce discovery;* but will not be enforced to aid a proceeding before arbitrators, or before an inferior court." He adds that the reason why it is refused in aid of proceedings in the ecclesiastical courts is because those courts have themselves ample power to compel a disclosure of facts. I think it clear that the "inferior courts" mentioned by Mr. Adams do not entirely correspond with the description given in Jeremy. It is very certain that a discovery will not be granted in aid of suits pending in courts of justices of the peace, and

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such tribunals which are in every way inferior. But in most of the states the courts of general original jurisdiction as to persons and subject-matter are limited as to locality, and to deny the "discovery" in aid of proceedings in these courts because they are "inferior" would virtually be to abolish discovery.

[4] Jeremy's Eq. Jur. 268; Street v. Rigby, 6 Ves. 821. The reason is, that such arbitrators are not a regular tribunal, but judges chosen by the parties outside of the ordinary course and mode of administering justice.

[5] British Empire Ship Co. v. Somes, 3 Kay & J. 433.

[6] Mitchell v. Smith, 1 Paige, 287; Daubigny v. Davallon, 2 Anstr. 467, 468; Earl of Derby v. Duke of Athol, 1 Ves. Sr. 202, 205; Bent v. Young, 9 Sim. 185; that a suit for discovery may be maintained in aid of a foreign court has certainly not become a universal rule. Mr. Adams strongly doubts its propriety: Adams's Eq., marg. p. 19. The recent decision in Reiner v. Marquis of Salisbury, L. R. 2 Ch. Div. 378, supports this doubt.

(a) **Discovery in Aid of Foreign Suit.**— In the case of Dreyfus v. Peruvian Guano Co., L. R. 41 Ch. Div. 151, the question whether jurisdiction existed to entertain a bill for discovery only in aid of an action pending in a foreign tribunal was directly passed upon, and the jurisdiction was expressly denied. In examining the question, Mr. Justice Kay, in his opinion, showed that the notion that such jurisdiction existed was directly traceable to a *dictum* of Lord Redesdale contained in his own work on pleadings (Mitford's Eq. Pl. 3d ed. 151, 5th ed., p. 221), which purported to be based on the authority of the case of Crowe v. Del Rio, erroneously called Crowe v. Del Ris, decided in 1769, and referred to in the subsequent case of Bent v. Young, 9 Sim. 180, and that such *dictum* was without support, and was founded on an erroneous construction of the case of Crowe v. Del Rio. In his opinion, Mr. Justice Kay expressly refers to the case of Mitchell v. Smith, 1 Paige, 287, and to the various text-writers, who state that the jurisdiction exists, and shows conclusively that these authorities based their opinions on Lord Redesdale's *dictum*, for in citing the case of Crowe v. Del Rio they have each copied his misspelling of the names of the defendants. The jurisdiction was upheld in Post v. Toledo, C. & St. L. R. Co., 144 Mass. 341, 11 N. E. 540, 59 Am. Rep. 86. The court said: "The jurisdiction which courts of equity exercise as ancillary to that of other courts is not, on either principle or authority, confined to other courts of the same state. A receiver has been appointed to collect or preserve property pending litigation in a foreign court, and an injunction

§ 197. The cause of action or the defense which can be aided by a suit for discovery must furthermore be wholly *civil* in its nature. The auxiliary jurisdiction of discovery will only be exercised on behalf of a contention, action, or defense entirely civil; and it will therefore withhold its aid from criminal prosecutions, actions penal in their nature, and controversies involving moral turpitude, or arising from acts clearly immoral, even though brought for the purpose of recovering pecuniary compensation.[1] [a] It was also a well-settled rule prior to the modern legislation, that equity would not interfere in aid of proceedings, otherwise suitable to be aided, in other courts which, by their constitution or established modes of procedure, were themselves able to give their suitors the needed relief by compelling the disclosure of facts or the production of documents.[2] As to the effect of the recent statutes conferring powers upon the law courts, and even upon courts of equity, which they did not originally possess, and thus obviating the necessity of a special resort to equity, there is, as has already been shown, a direct antagonism among the decided cases; some holding that the auxiliary equitable jurisdiction remains unaffected, others declaring it abridged or abrogated.[3] [b] The action in aid of which the discovery is sought may be pending; but this is not necessary. It is sufficient if the plaintiff in the bill for a discovery shows that he has a right to maintain or defend an action in another court, and that he is about to sue or is liable to be sued therein, al-

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[1] Black v. Black, 26 N. J. Eq. 431 (no discovery granted as to commission of adultery); Currier v. Concord R. R., 48 N. H. 321; Glynn v. Houston, 1 Keen, 329; Earl of Suffolk v. Green, 1 Atk. 450; East India Co. v. Campbell, 1 Ves. Sr. 246; King v. Burr, 3 Mer. 693; Claridge v. Hoare, 14 Ves. 59, 65; Montague v. Dudman, 2 Ves. Sr. 398; Litchfield v. Bond, 6 Beav. 88; Short v. Mercier, 3 Macn. & G. 205; United States v. McRae, L. R. 3 Ch. 79; United States v. McRae, L. R. 4 Eq. 327; United States v. Saline Bank, 1 Pet. 100, 104; Ocean Ins. Co. v. Fields, 2 Story, 59; Stewart v. Drasha, 4 McLean, 563; Union Bank v. Barker, 3 Barb. Ch. 358; Skinner v. Judson, 8 Conn. 528, 21 Am. Dec. 691; Northrup v. Hatch, 6 Conn. 361; Poindexter v. Davis, 6 Gratt. 481; as to discovery in aid of suits for slander and libel, see Bailey v. Dean, 5 Barb. 297; Thorpe v. Macauley, 5 Madd. 229, 230; Shackell v. Macauley, 2 Sim. & St. 79, 2 Russ. 550, note, 1 Bligh, N. S., 96, 133, 134; Wilmot v. Maccabe, 4 Sim. 263; Southall v. ———, 1 Younge, 308; Hare on Discovery, 116, 117.

has been granted against transferring property until the title could be determined in a foreign court. In the present case the fact that all the officers and all the books of the corporation are without the state of Ohio makes it, as the bill alleges, impossible for the plaintiff to obtain discovery in the Ohio courts, and, as we think the plaintiff is entitled to discovery from the officers of the corporation, we are of opinion that a bill for discovery may be maintained here, where the officers and books of the corporation are." In Van Dyke v. Van Dyke (N. J.), 49 Atl. 1116, it was held that where a discovery of facts was necessary before complainant could accept any settlement by administrators in the orphans' court of another state, the court might allow discovery.

(a) Cited and similar language used in Reynolds v. Burgess Sulphite Fibre Co., 71 N. H. 332, 341–345, 51 Atl. 1075, 57 L. R. A. 949, 93 Am. St. Rep. 535, 544–549. In this case it is held that a discovery may be had in aid of an action at law for a *personal tort*. The court held that the action, being for negligence merely, did not involve moral turpitude. The case contains an excellent discussion of the right to discovery in such a case and cites many of the authorities. That discovery lies in aid of actions of tort relating to property is unquestioned, citing East India Co. v. Evans, 1 Vern. 307; Marsden v. Panshall, 1 Vern. 407; Heathcote v. Fleete, 2 Vern. 442; Morse v. Buckworth, 2 Vern. 443; Sloane v. Hatfield, Bunb. 18; Taylor v. Crompton, Bunb. 95; Macclesfield v. Davis, 3 Ves. & B. 16;

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[2] Jeremy's Eq. Jur. 269; Dunn v. Coates, 1 Atk. 288; Anonymous, 2 Ves. 451; Gelston v. Hoyt, 1 Johns. Ch. 547. In Leggett v. Postley, 2 Paige, 599, it was held that a discovery would not be granted merely to guard against anticipated perjury on the trial of a suit at law. In Gelston v. Hoyt, 1 Johns. Ch. 547, Chancellor Kent lays down the doctrine in a very sweeping manner, but his statement of the rule is too broad, and must not be accepted without much limitation, as has been shown by subsequent authorities. He says: "If a bill seeks discovery in aid of the jurisdiction of a court of law, it ought to appear that such aid is required. If a court of law can compel the discovery, a court of equity will not interfere. And the facts which depend upon the testimony of witnesses can be procured or proved at law, because courts of law can compel the attendance of witnesses. It is not denied in this case but that every fact material to the defense at law can be proved by ordinary means at law, without resorting to the aid of this court. . . . Unless, therefore, the bill states affirmatively that the discovery is really wanted for the defense at law, and also shows that the discovery might be material to that defense, it does not appear to be reasonable and just that the suit at law should be delayed." The same rule was stated in Seymour v. Seymour, 4 Johns. Ch. 411, and Leggett v. Postley, 2 Paige, 599, 601. But the rule as thus stated is confined to suits for discovery *and relief*, and does not apply to suits for discovery proper, i. e., the pure exercise of the auxiliary jurisdiction. When an action is pending at law, and one of the parties seeks to withdraw the entire controversy from that tribunal into a court of equity, on the ground that a discovery is needed, and files a bill in equity praying for a discovery *and for final relief*, and an injunction upon the action at law, he must affirmatively allege in his bill that a discovery is necessary, and that the facts which he seeks to obtain, and which are material to his contention, *cannot* be proved by witnesses or by the ordinary testimony in the court of law. There is no such requisite to the maintaining a suit for discovery proper without relief. The plaintiff in the suit must, of course, show that the matters which he seeks to obtain are *material* to his contention, but not that the suit for a discovery is the only means of obtaining them. In

Burrell v. Nicholson, 3 Barn. & Adol. 649, 1 Mylne & K. 680. That discovery may be had in aid of the defense to a suit for libel, citing Macauley v. Shackell, 1 Bligh, N. S., 96; Wilmot v. Maccabe, 4 Sim. 263; Thorpe v. Macauley, 5 Mad. 218; Marsh v. Davison, 9 Paige 580, 584, 585, 586; but *contra*, that discovery cannot be sustained in aid of an action for a mere personal tort, *dicta* in Glynn v. Houston, 1 Keen, 329; Pye v. Butterfield, 5 Best & S. 829, 836; and Lyell v. Kennedy, 8 App. Cas. 217, 233; and the decision in Robinson v. Craig, 16 Ala. 50.

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other words, a suit for a discovery is proper, not only when the plaintiff therein is without other means of proof, but also in aid of his other evidence, or even to dispense with the necessity of other evidence. All the text-writers are agreed upon this view of the object and use of "discovery" proper: Hare on Discovery, 1, 110; Wigram on Discovery, 4, 5, 25; Story's Eq. Pl., § 319, note 3. In Mitford's Eq. Pl. (Jeremy's ed.) 307, it is said: "The plaintiff may require this discovery, either because he cannot prove the facts, or in aid of proof, or to avoid expense." In Earl of Glengall v. Frazer, 2 Hare, 99, 105, Wigram, V. C., said: "The plaintiff is entitled to a discovery, not only in respect to facts which he cannot otherwise prove, but also as to facts the admission of which will relieve him from the necessity of adducing proof from other sources." The decisions are to the same effect: Montague v. Dudman, 2 Ves. Sr. 398; Brereton v. Gamul, 2 Atk. 241; Peck v. Ashley, 12 Met. 481; Stacy v. Pearson, 3 Rich. Eq. 152; Chambers v. Warren, 13 Ill. 321; Williams v. Wann, 8 Blackf. 478. In March v. Davison, 9 Paige, 580, the rule laid down in Leggett v. Postley, 2 Paige, 599, and Gelston v. Hoyt, 1 Johns. Ch. 547, so far as it applied to suits for a discovery alone, was expressly overruled. See also French v. First Nat. Bank, 7 Ben. 488; Shotwell v. Smith, 20 N. J. Eq. 79.

[3] It has been held that the statutes permitting parties to be examined as witnesses, and providing summary modes for compelling the production of documents, have not affected the auxiliary equitable jurisdiction for discovery: Lovell v. Galloway, 17 Beav. 1; British Emp. Ship Co. v. Somes, 3 Kay & J. 433; Cannon v. McNab, 48 Ala. 99; Shotwell v. Smith, 20 N. J. Eq. 79. But, *per contra*, such statutes have abolished the jurisdiction: Riopelle v. Doellner, 26 Mich. 102; Heath v. Erie R. R., 9 Blatch. 316; also a statute allowing the defendant in a suit in equity to examine the plaintiff therein upon interrogatories does not affect the jurisdiction to entertain a cross-bill by defendant for purpose of a discovery: Millsaps v. Pfeiffer, 44 Miss. 805; but, *per contra*, see Heath v. Erie R. R., 9 Blatchf. 316.

(b) Cited with approval to effect that jurisdiction is not lost. Handley v. Hiffin, 84 Ala. 600, 4 South. 725.

though no action is yet commenced; a discovery may be needed to determine the proper parties, or to properly frame the allegations of his pleading.[4] [c] But after a judgment or verdict in the action at law, it is too late to bring a suit for discovery alone.[5]

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[4] Kearney v. Jeffries, 48 Miss. 343; Buckner v. Ferguson, 44 Miss. 677; Hoppock v. United, etc., R. R., 27 N. J. Eq. 286; Baxter v. Farmer, 7 Ired. Eq. 239; Turner v. Dickerson, 9 N. J. Eq. 140; Moodalay v. Morton, 1 Brown Ch. 469, 2 Dick. 652; Angell v. Angell, 1 Sim. & St. 83; City of London v. Levy, 8 Ves. 404.

(c) **Discovery in Aid of Future Action.**—The text is cited to the effect that a discovery may be needed to determine the *proper parties* in Hurricane Tel. Co. v. Mohler, 51 W. Va. 1, 41 S. E. 421. So "when a plaintiff has a cause of action against persons who are defined either by statute, or by their relations to property or a business by the management of which the plaintiff has suffered injury, and the names and residences of these persons are unknown to him, it is not clear that there may not be such a state of facts that a court ought to compel a discovery of the names and residences of these persons from their agents in charge of the property or business; and the decisions recognize that this may sometimes be done." Post v. Toledo, C. & St. L. R. Co., 144 Mass. 341, 11 N. E. 540, 59 Am. Rep. 86. In this case a discovery of the names and addresses of the stockholders of a corporation was allowed. So held, also, in Clark v. Rhode Island Locomotive Works, 24 R. I. 307, 53 Atl. 47. But see Brown v. M'Donald, 130 Fed. 964, where the complainant was held to have an adequate remedy at law by calling defendants as witnesses in the legal action.

However, a bill of discovery cannot be used for mere "fishing" purposes. Thus, in George v. Solomon, 71 Miss. 168, 14 South. 531, plaintiff alleged that he paid rent to two different persons whom he made defendants and asked a discovery in order that it appear which should refund. Discovery was refused, the court saying: "The bill is a pure and simple fishing bill, and complainant angles in the broadest water. If relief, under these circumstances, can be afforded in equity, we see no reason why the owner of lost or stolen property might not implead in one suit the residents of a city or county upon the averment that some one of them — which one, the complainant is not informed — has converted his property and is liable for its value." See also First Nat. Bank v. Phillips, 71 Miss. 51, 15 South. 29.

As holding in accordance with the text, that a discovery may be had as auxiliary to the maintenance of a suit not yet brought, see Parrott v. Chestertown Nat. Bank, 88 Md. 515, 41 Atl. 1067; Wolf v. Wolf's Ex'r, 2 Har. & G. 382, 18 Am. Dec. 313; Heinz v. German Fire Ins. Co., 95 Md. 760, 51 Atl. 951; Post v. Toledo, C. & St. L. R. Co., 144 Mass. 341, 11 N. E. 540, 59 Am. Rep. 86; Reynolds v. Burgess Sulphite Fibre Co., 71 N. H. 332, 341, 51 Atl. 1075, 93 Am. St. Rep. 535, 544, 57 L. R. A. 949 (citing the text, and Marsden v. Panshall, 1 Vern. 437; Bovill v. Moore, 2 Coop. Ch. Cas. 56; Heathcote v. Fleete, 2 Vern. 442; Morse v. Buckworth, 2 Vern. 443; Russell v. Cowley, 1 Webst. Pat. Cas. 457; Patent Type Founding Co. v. Walter, Johns. 727).

§ 198. II. **The Parties, their Situation and Relations to Each Other, in Order that a Discovery may be Granted — The Plaintiff.**— Either the plaintiff or the defendant in the pending or anticipated action at law may file a bill for a discovery. Since by the rules of equity pleading, independent of modern statutes, only the complainant can compel a disclosure on oath from his adversary, if the defendant in an equity suit needs a discovery he must file a cross-bill, and thus become a plaintiff for that purpose.[1] As the first requisite, the plaintiff in the equity suit for a discovery must show that he has a title or interest in the subject-matter to which the proposed discovery relates, such an interest as he can maintain or defend in a proceeding pending or to be brought in another tribunal, and must thus show that he is entitled to the discovery. A mere stranger is never allowed to maintain a suit for discovery concerning a subject-matter in which he has no interest enforceable by a judicial proceeding, or concerning the title or estate of a third person.[2][a] In addition to exhibiting a title or interest in the subject-matter, the allegations of the plaintiff's bill must show that a discovery would not be useless. The plaintiff in the discovery suit must show by his averments, at least in a *prima facie* manner, that if he is the plaintiff in the action at law he has a good cause of action, and if he is the defendant, he has a good defense thereto. While it is not necessary that his right of action or of defense at law should be beyond dispute, still, if the bill should negative the existence of any such right, the court of equity would of course refuse a discovery which would then be useless.[3][b] If the result of the controversy at law is doubtful, even when the defendant in the suit for a discovery has denied the plaintiff's title, or has set up matter which if true would operate as a complete defense, the court of equity will, in general, grant the discovery, and leave the issue to be tried and finally determined by the court of law.[4]

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[5] Green v. Massie, 21 Gratt. 356; McCollum v. Prewitt, 37 Ala. 573; Duncan v. Lyon, 3 Johns. Ch. 355, 402, 8 Am. Dec. 513; Cowman v. Kingsland, 4 Edw. Ch. 627; Foltz v. Pourie, 2 Desaus. Eq. 40; Faulkner's Adm'r v. Harwood, 6 Rand. 125. If equity has concurrent jurisdiction, a bill may be filed for *relief* and discovery as an incident thereto, and to enjoin the action at law even after judgment.

[1] Millsap v. Pfeiffer, 44 Miss. 805; Bogert v. Bogert, 2 Edw. Ch. 399. To aid the defendant in obtaining a discovery, and the production of documents upon his cross-bill, the court may stay the proceedings of the plaintiff on his original bill until he has fully answered the cross-bill, made complete discovery, or produced the needed documents: Princess of Wales v. Lord Liverpool, 1 Swanst. 114; Taylor v. Heming, 4 Beav. 235; Bate v. Bate, 7 Beav. 528; Milligan v. Mitchell, 6 Sim. 186; Penfold v. Nunn, 5 Sim. 405; United States v. Wagner, L. R. 2 Ch. 582; Talmage v. Pell, 9 Paige, 410; White v. Buloid, 2 Paige, 164.

It should be remembered, in applying these settled rules, that by the present practice in England and in many of our states, the defendant in an equity suit no longer files a cross-bill, and the defendant (or plaintiff) in a suit at law no longer files a "bill of discovery"; in either case the defendant may set up any ground for affirmative relief in a "counterclaim," and may obtain a discovery by means of "interrogatories" submitted in the action itself. The settled doctrines of equity apply to this new mode of procedure: Saunders v. Jones, L. R. 7 Ch. Div. 435, 443, per Bacon, V. C.; Cashin v. Craddock, L. R. 2 Ch. Div. 140; Anderson v. Bank of British Columbia, L. R. 2 Ch. Div. 644; Hoffman v. Postill, L. R. 4 Ch. 673.

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[2] Jeremy's Eq. Jur. 258; Baxter v. Farmer, 7 Ired. Eq. 239; Turner v. Dickerson, 9 N. J. Eq. 140; Carter v. Jordan, 15 Ga. 76; Jones v. Bradshaw, 16 Gratt. 355; Continental Life Ins. Co. v. Webb, 54 Ala. 688; Brown v. Dudbridge, 2 Brown Ch. 321, 322; Brownsword v. Edwards, 2 Ves. Sr. 243, 247.

On this ground the heir at law cannot, during the life of his ancestor, maintain a suit for discovery concerning the estate, since he has no present interest in it: Buden v. Dore, 2 Ves. 445; and the heir at law cannot compel a production of deeds relating to the estate in possession of the devisee, unless he is an heir in tail; but the devisee is entitled to such production from the heir at law: Shaftesbury v. Arrowsmith, 4 Ves. 71; Cooper's Eq. Pl., chap. 1, § 4, pp. 58, 59; chap. 3, § 3, pp. 197, 198. As a general rule, the plaintiff is confined to facts connected with or relating to his own title or estate, and cannot investigate the title or estate of the defendant in the discovery suit. This rule, however, has sometimes been relaxed when necessary for the ends of justice, and the following cases are examples both of the rule and its application: Brown v. Wales, L. R. 15 Eq. 142; Girdelstone v. North British, etc., Co., L. R. 11 Eq. 197; Com'rs, etc. v. Glasse, L. R. 15 Eq. 302; Kettlewell v. Barstow, L. R. 7 Ch. 686; Slack v. Black, 109 Mass. 496; Haskell v. Haskell, 3 Cush. 540; Sackvill v. Ayleworth, 1 Vern. 105; Dursley v. Fitzhardinge, 6 Ves. 260; Allan v. Allan, 15 Ves. 131; Attorney-General v. Duplessis, Parker, 144, 155–164; 5 Brown Parl. C. 91; Glegg v. Legh, 4 Madd. 193, 208; Wigram on Discovery, 21, 22; Jeremy's Eq. Jur. 262, 263.

[3] Jeremy's Eq. Jur. 261; Cardale v. Watkins, 5 Madd. 18; Wallis v. Duke of Portland, 3 Ves. 494; Lord Kensington v. Mansell, 13 Ves. 240; Angell

(a) See also Camp v. Ward, 69 Vt. 286, 60 Am. St. Rep. 929, 37 Atl. 747.

(b) "Unless the facts set forth in the bill, admitting their truth, would enable the plaintiff to maintain an action, he has no title to the assist-

§ 199. **The Defendant.**— I proceed to consider, in the next place, the requisites concerning the defendant in a suit for a discovery. No discovery can be compelled from an incompetent defendant; as, for example, an infant, or a lunatic without committee.[1] The general rule is well settled, and admits of only one or two special exceptions, which are necessary to prevent a failure of justice, that no person can properly be made a defendant in the suit for a discovery, or compelled as such to disclose facts within his knowledge, unless he has an interest in the subject-matter

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v. Draper, 1 Vern. 399; Macauley v. Shackell, 1 Bligh, N. S., 120; Thomas v. Tyler, 3 Younge & C. 255; Metler v. Metler, 19 N. J. Eq. 457; Slack v. Black, 109 Mass. 496.

[4] March v. Davison, 9 Paige, 580; Lane v. Stebbins, 9 Paige, 622; Deas v. Harvie, 2 Barb. Ch. 448; Bailey v. Dean, 5 Barb. 297; Peck v. Ashley, 12 Met. 478; Thomas v. Tyler, 3 Younge & C. 255, 261, 262; Hare on Discovery, 43–46. A suit for discovery alone may thus sometimes be maintained where a bill for discovery *and relief* would be overruled; but not after a judgment or verdict in an action at law: McCollum v. Prewitt, 37 Ala. 573; Treadwell v. Brown, 44 N. H. 551; Primmer v. Patten, 32 Ill. 528; Chichester v. Marquis of Donegal, L. R. 4 Ch. 416; Kettlewell v. Barstow, L. R. 7 Ch. 686; Thompson v. Dunn, L. R. 5 Ch. 573; Smith v. Duke of Beaufort, 1 Phill. Ch. 209.

[1] Or the attorney-general, when sued on behalf of the crown: Micklethwaite v. Atkinson, 1 Coll. C. C. 173, Adams's Eq. 8. The joinder, as defendants in the same suit for a discovery, of defendants in separate actions at law is irregular: Broadbent v. State, 7 Md. 416; McDougald v. Maddox, 17 Ga. 52.

ance of a court of equity to obtain evidence of the truth of the case." Hurricane Tel. Co. v. Mohler, 51 W. Va. 1, 41 S. E. 421, citing this section of the text. Of course, where discovery is merely incidental to other equitable relief, the bill cannot be maintained when a right to relief is not made out. Everson v. Equitable Life Assur. Co., 68 Fed. 258 (account and discovery); American Ore Mach. Co. v. Atlas Cement Co., 110 Fed. 53 (account and discovery); Welles v. Rhodes, 59 Conn. 498, 22 Atl. 286 (bill to quiet title); Courter v. Crescent Sewing Mach. Co., 60 N. J. Eq. 413, 45 Atl. 609 (account and discovery).

of the controversy in aid of which the discovery is asked.[2] Thus, as an illustration of this rule, arbitrators cannot, in general, be joined as defendants to a bill of discovery and compelled to disclose the grounds of their award,[3] but if they are charged with actual misconduct, fraud, or corruption, they are obliged to answer with respect to such allegations.[4] As another illustration of the rule, mere witnesses cannot be joined as defendants and obliged to answer; nor can a mere agent be made a party for purpose of obtaining a discovery from him.[5] [a] This application of the rule is not without exception. Where an agent, as, for example, an attorney, has assisted his principal in the accomplishment of actual fraud, he may be made a co-defendant and compelled to disclose the facts.[6] The most important exception is in case of suits against corporations. Where it is desired to obtain discovery from a corporation in a bill filed against it for that purpose, it is firmly settled by the authority of decided cases that a secretary or some other officer may and must be joined as a co-defendant, from whom the discovery may be obtained by his answer under oath. This exception is based wholly upon considerations of expediency, since a corporation cannot make an answer on oath, nor be liable for perjury.[7] [b] For the same reason, the rule has been extended by modern cases to suits by and cross-bills against nations or states which are not monarchical, such as the United States of America and other republics.[8]

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[2] Jeremy's Eq. Jur. 259; Brownsword v. Edwards, 2 Ves. Sr. 243; Neuman v. Godfrey, 2 Brown Ch. 332; Plummer v. May, 1 Ves. Sr. 426; Dineley v. Dineley, 2 Atk. 394; Finch v. Finch, 2 Ves. Sr. 491; Fenton v. Hughes, 7 Ves. 287. Thus it has been held that in a suit by his creditors against a bankrupt and his assignees, he cannot be compelled to make discovery because he has parted with his interest: De Golls v. Ward, 3 P. Wms. 311, note; Griffin v. Archer, 2 Anstr. 478, 2 Ves. 643; Whitworth v. Davis, 1 Ves. & B. 545. The exceptions to this rule belong much more frequently to suits for relief, in which discovery is asked as an incident, than to suits for a discovery proper without relief. It was decided in In re Barned's Bank, L. R. 2 Ch. 350, that an official "liquidator," in winding up corporations, under the statute, is in all respects in the same position as any other defendant, and is not deemed an officer of the court; i. e., if joined as a defendant in a suit against the corporation, all the rules as to discovery, production of documents, privilege, etc., apply to him.

[3] Stewart v. East India Co., 2 Vern. 380; Anonymous, 3 Atk. 644; Tittenson v. Peat, 3 Atk. 529.

[4] Jeremy's Eq. Jur. 260; Ives v. Medcalf, 1 Atk. 63; Lingood v. Croucher, 2 Atk. 395; Lonsdale v. Littledale, 2 Ves. 451; Dummer v. Corp'n of Chippenham, 14 Ves. 252; Chicot v. Lequesne, 2 Ves. Sr. 315, 418; Lindsley v. James, 3 Cold. 477.

[5] Ballin v. Ferst, 55 Ga. 546; and see cases cited in the three preceding notes.

(a) Cited to the effect that bill for discovery does not lie against mere witnesses in Hanley v. Wetmore, 15 R. I. 386, 6 Atl. 777; Hurricane Tel. Co. v. Mohler, 51 W. Va. 1, 41 S. E. 421. See also Detroit Copper & Brass Rolling Mills Co. v. Ledwidge, 162 Ill. 305, 44 N. E. 751, where it was held that a creditor's bill for discovery alone cannot be maintained against the debtor's debtor; Post v. Toledo, C. & St. L. R. Co., 144 Mass. 341, 11 N. E. 540, 59 Am. Rep. 86.

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[6] Ballin v. Ferst, 55 Ga. 546; Bowles v. Stewart, 1 Schoales & L. 227; Bennet v. Vade, 2 Atk. 324; Fenwick v. Reed, 1 Mer. 114; Plummer v. May, 1 Ves. Sr. 426; Brace v. Harrington, 2 Atk. 235; Dummer v. Corp'n of Chippenham, 14 Ves. 252, 254; Jeremy's Eq. Jur. 260; Gartland v. Nunn, 11 Ark. 721.

[7] Jeremy's Eq. Jur. 260; Wych v. Meal, 3 P. Wms. 311, 312, per Talbot, L. C. (the leading case); French v. First Nat. Bk., 7 Ben. 488; Fenton v. Hughes, 7 Ves. 288–291, per Eldon, L. C.; Dummer v. Corp'n of Chippenham, 14 Ves. 252; Glasscott v. Copper Min. Co., 11 Sim. 305; Ex parte The Contract Co., L. R. 2 Ch. 350; Gooch's Case, L. R. 7 Ch. 207; Ayers v. Wright, 8 Ired. Eq. 229; Yates v. Monroe, 13 Ill. 212; Many v. Beekman Iron Co., 9 Paige, 188.

(b) **Suits against Corporations; Parties Defendant.**— The text is cited to the effect that an officer should be made a party in Virginia & A. Min. & Mfg. Co. v. Hale, 93 Ala. 542, 9 South. 256. See also Roanoke St. Ry. Co. v. Hicks, 32 S. E. 295, 96 Va. 510; Munson v. German-American Fire Ins. Co. (W. Va.), 47 S. E. 160. In Colgate v. Compagnie Francaise du Telegraphe, 23 Fed. 82, the court said: "Undoubtedly, a corporation cannot be compelled to answer under oath to a bill in equity. It answers only under the seal of the corporation. It is for this reason the practice has obtained of making the officers of the corporation parties to the bill and requiring them to answer the interrogatories. This, however, does not excuse a corporation from answering . . . . Although no officer or agent is made a party to the bill, it is still the duty of the corporation to cause diligent examination to be made, and give in its answer all the information derived from such examination; and if it alleges ignorance without excuse, a disposition on its part to defeat and obstruct the course of justice may be inferred which will justify the court in charging it with the costs of the suit." In Continental Nat. Bank v. Heilman, 66 Fed. 184, also, it is held that the officers are not necessary parties, although it is customary to make them parties.

§ 200. **A Bona Fide Purchaser.**— Where the defendant is a *bona fide* purchaser of the property which is the subject-matter of the controversy, or which his adversary is endeavoring to reach, for a valuable consideration actually paid, and without notice of the plaintiff's claim, he is protected, not only from relief concerning the property in a suit brought for that purpose, but he is also freed from the duty of making discovery, which might otherwise have rested upon him, of any facts and circumstances tending to aid the plaintiff in *his* contention in a suit of discovery alone. To constitute him a purchaser in good faith for a valuable consideration, so as to come within the operation of this equitable doctrine, he must have actually paid the purchase price which forms the valuable consideration.[1] [a]

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[8] United States v. Wagner, L. R. 2 Ch. 582; L. R. 3 Eq. 724; Prioleau v. United States and Andrew Johnson, L. R. 2 Eq. 659. See also Republic of Costa Rica v. Erlanger, L. R. 1 Ch. Div. 171, L. R. 19 Eq. 33; Republic of Peru v. Weguelin, L. R. 20 Eq. 140. In King of Spain v. Hullett, 1 Clark & F. 333, the house of lords held that when a foreign monarch sues in his own name, he thereby submits himself to the jurisdiction and ordinary practice of the court; and if the defendant files a cross-bill for a discovery, the king must make his answer and swear to it personally, as any other plaintiff would be required to do. This and other cases also hold that when a foreign monarch sues, the court regards him as suing personally, and not in any representative or official character. It is otherwise when a nation or state sues in its corporate capacity. See also King of the Sicilies v. Wilcox, 1 Sim., N. S., 301; Colombian Government v. Rothschild, 1 Sim. 94.

[1] Jeremy's Eq. Jur. 263, 264; Stanhope v. Earl Verney, 2 Eden, 81; Maundrell v. Maundrell, 10 Ves. 246, 259, 260, 270; Jones v. Powles, 3 Mylne & K. 581, 596–598; McNeil v. Magee, 5 Mason, 269, 270; Wood v. Mann, 1 Sum. 506; Flagg v. Mann, 2 Sum. 487; Willoughby v. Willoughby, 1 Term Rep. 763, 767, per Lord Hardwicke. See the whole subject of *bona fide* purchasers, notice, and priorities discussed in the notes to Bassett v. Nosworthy, Cas. t. Finch, 102, and Le Neve v. Le Neve, Amb. 436, 3 Atk. 646, 1 Ves. Sr. 64, in 2 Lead. Cas. Eq., 4th Am. ed., 1, 4–108, 109, 117–227. The system of registering conveyances, mortgages, judgments, and other encumbrances, universal in the United States, has rendered the equitable doctrines concerning "notice," "priorities," and "*bona fide* purchasers" of

(a) As to the necessity of payment of the purchase price in order to become a *bona fide* purchaser, see *post*, §§ 750, 751.

The protection of *bona fide* purchasers for a valuable consideration without notice of opposing claims is a principle running through the entire equity jurisprudence, and is one of its most righteous and efficient doctrines in promoting justice. Although the general rules are well settled that as among mere equities to the same property, the one which is prior in time is also prior in right, and as between two holders of different equities to the same property, the one who has also obtained a legal title has thereby acquired the precedence, and that a purchaser without any show or semblance of title cannot claim protection as a *bona fide* purchaser from the equitable principle above mentioned,[2] still it is not absolutely essential that a purchaser in good faith for a valuable consideration and without notice, in order to come within the meaning and operation of the doctrine, and to be protected against discovery in aid of his adversary, or against relief, should always be a purchaser of a legal title. The principle upon which equity proceeds is, that "if a defendant has in conscience a right equal to that claimed by the person filing a bill against him, although he is not clothed with a perfect legal title, this circumstance, in his position as defendant, renders it improper for a court of equity to compel him to make any discovery which may hazard his title."[3] It is also settled, as a corollary

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less frequent application in this country than in England; but the same doctrines form a part of our equity jurisprudence, and are constantly invoked and applied by the courts whenever circumstances require or permit.

[2] Payne v. Compton, 2 Younge & C. 457; Fitzsimmons v. Ogden, 7 Cranch, 2; Vattier v. Hinde, 7 Pet. 252, 271; Boone v. Chiles, 10 Pet. 177; and see notes to Bassett v. Nosworthy, and Le Neve v. Le Neve, 2 Lead. Cas. Eq. 1-108, 109-227.

[3] Mitford's Eq. Pl. (Jeremy's ed.) 199. The substance of this doctrine is, that courts of equity will not take any step *against* such an innocent purchaser, but will suffer him to take every advantage which the law gives him; for there is nothing which can, in the language of equity, attach itself upon or work on his conscience, in favor of an adverse claimant: Story's Eq. Jur., § 1503. See, on this general subject, Payne v. Compton, 2 Younge & C. 457, 461; Bechinall v. Arnold, 1 Vern. 355; Dursley v. Fitzhardinge, 6 Ves. 263; Jerrard v. Saunders, 2 Ves. 458, per Loughborough, L. C.; Senhouse v. Earl, 2 Ves. Sr. 450; Wortley v. Birkhead, 2 Ves. 573, 574;

of the principle, that a purchaser of property with notice from a *bona fide* purchaser for a valuable consideration, and without notice, acquires the rights of and is entitled to the same protection as his grantor.[4] These rules of protection to the innocent purchaser are, of course, recognized and acted upon by the courts in administering relief; and although they can no longer, in many states, be applied in suits for a discovery to excuse him from answering, they should still, on principle, furnish the proper limitations to the examination of such a purchaser as a witness by his adversary, when he is a party to a litigation involving his title, where such examination has taken the place of the equitable suit for a discovery.[b]

Langton v. Horton, 1 Hare, 547, 563; Skeeles v. Shearley, 8 Sim. 153, 3 Mylne & C. 112; Doe ex dem. Coleman v. Britain, 2 Barn. & Ald. 93; Wood v. Mann, 1 Sum. 507–509.

[4] Varick v. Briggs, 6 Paige, 323, 329; Jackson v. McChesney, 7 Cow. 360, 17 Am. Dec. 521. And see notes to Bassett v. Nosworthy, and Le Neve v. Le Neve, 2 Lead. Cas. Eq. 1, 109. In fact, the rights once acquired by the *bona fide* purchaser for a valuable consideration, and without notice, are transferred to his heirs, devisees, and other purely voluntary assignees. It has been held in England that a judgment creditor, who has taken the land of his debtor by an *elegit*, is not to be regarded as a *bona fide* purchaser within the meaning of the rule; and therefore such a judgment creditor, taking the land of his debtor by an *elegit*, which was subject to a prior equitable mortgage, of which he had no notice at the time of executing the *elegit*, was decreed to hold the land only in subordination to the lien of the equitable mortgage: Whitworth v. Gaugain, 3 Hare, 416. The same has been held in this country with respect to a judgment creditor who obtains title to his debtor's land by levy thereon under an execution: Hart v. Farmers' and Mech. Bank, 33 Vt. 252; Abell v. Howe, 43 Vt. 403; but see Danbury v. Robinson, 14 N. J. Eq. 213, 82 Am. Dec. 244.

(b) See also § 764 *et seq.* In Ind, Coope, & Co. v. Emmerson, L. R. 12 App. C. 300, the effect of the judicature act of 1873 upon the doctrine that a *bona fide* purchaser was protected in a suit for discovery alone from making discovery was discussed. This was a suit brought in the Chancery Division of the High Court of Justice, by the holder of the legal title to lands, to recover their possession, and in it the plaintiff claimed the discovery of certain papers and documents which she alleged were material to her title. To the prayer for discovery, the defendants set up that they were *bona fide* purchasers. It will be noticed that the plaintiff's case, so far as it sought to recover the possession of the land, was one that, prior to the judicature act, would have been enforced in a legal action of ejectment, and that the discovery would have been obtained in a

§ 201. III. The Nature, Subject-matter, and Objects of the Discovery Itself; that is, the Matters concerning Which the

bill brought for that purpose, to which the defense of *bona fide* purchaser would have been a complete answer. The defendants contended that the same protection was afforded them in the present action, and that the consolidation of the legal and equitable actions in the one action authorized by the judicature act had made no change in the pre-existing equitable rules as to discovery in cases of *bona fide* purchaser. In disposing of this contention, Lord Chancellor Selborne said: "The first observation to be made is, that the court of chancery, when it allowed a plea of purchase for valuable consideration without notice to a bill for discovery only, allowed it, not to particular discovery (as, e. g., of certain deeds and documents), but to the whole, not on the ground that certain things ought not to be inquired into, but because the court ought not, as against such a purchaser, to give any assistance whatever to a plaintiff suing upon a legal title in another jurisdiction. And upon the same ground, a like plea would have been allowed to a suit asking for more than discovery (e. g., for an injunction to restrain the defendant at law from setting up outstanding terms), when the object of the suit was still to obtain from the court of chancery assistance to the suit of the plaintiff suing upon a legal title in another jurisdiction. The defense was, in effect '*no equity*,' which is a different thing from an 'equitable defense.' It was thought inequitable, generally, that a man should defeat a legal title by keeping back facts in his own knowledge, or by setting up outstanding terms; it was thought *not* inequitable that a purchaser for value without notice should use any such *tabula in naufragio* as best he could. But in the present case there is no suit in any other jurisdiction; the High Court of Justice is asked, and is competently asked, to exercise a principal and not an auxiliary jurisdiction, and to give effect to the legal title which the plaintiff alleges to be in herself. If a like suit had formerly been brought in the court of chancery it would have been demurrable, not because there was an equitable defense, but because the title was legal, and the plaintiff stated no equity. To abolish that division of jurisdictions was the very object of the judicature act. . . . . In the class of cases referred to, the separation and division of jurisdictions between the courts of equity and the courts of common law was the real and only ground on which such a defense was admitted. As against an innocent purchaser sued at law, the court of chancery (having no jurisdiction itself to try the title) found no equity requiring it to give assistance to a proceeding brought elsewhere for that purpose. But it is impossible, without departing from that ground, to make the same defense available against discovery (otherwise proper) in a suit in which it is not available against the relief, and in which the High Court has proper jurisdiction to try, and must try, and determine the question of title, and accordingly we find that there is no instance of any suit competently brought in the court of chancery for relief, as well as discovery in which the defense of purchaser for value without notice has been held available against discovery incident to the relief, and not against the relief itself also. That defense was never admitted as an objection to particular discovery; it went to all or

Plaintiff may Inquire and Compel a Discovery, and the Defendant must Answer and Make Discovery.[a]— The fundamental rule on this subject is, that the plaintiff's right to a discovery does not extend to all facts which may be material to the issue, but is confined to facts which are material *to his own title or cause of action;* it does not enable him to pry into the defendant's case, or find out the evidence by which that case will be supported. The plaintiff is entitled to a disclosure of the defendant's title, and to know what his defense is, but not to a statement of the evidence upon which the defendant relies to establish it.[1] [b] This rule, however, must be understood with the limitation that the plaintiff may compel the discovery of all facts material to his own cause of action, even though the defendant's

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[1] Jeremy's Eq. Jur. 262, 263; Wigram on Discovery, 21, 22; see quotation *ante*, § 195, note; Hoppock v. United, etc., R. R., 27 N. J. Eq. 286; French v. Rainey, 2 Tenn. Ch. 641; Richardson v. Mattison, 5 Biss. 31; Kearney v. Jeffries, 48 Miss. 343; Heath v. Erie R. R., 9 Blatch. 316; Sackvill v. Ayleworth, 1 Vern. 105; Dursley v. Fitzhardinge, 6 Ves. 260; Allan v. Allan, 15 Ves. 131; Janson v. Solarte, 2 Younge & C. 127; Attorney-General v. Corp'n of London, 2 Macn. & G. 247; Llewellyn v. Badely, 1 Hare, 527; Lowndes v. Davies, 6 Sim. 468; Glasscott v. Copper Miners' Co., 11 Sim. 305; Bellwood v. Wetherell, 1 Younge & C. 211–218; Cullison v. Bossom, 1 Md. Ch. 95; Phillips v. Prevost, 4 Johns. Ch. 205; Cuyler v. Bogert, 3 Paige, 186; Bank of Utica v. Mersereau, 7 Paige, 517; King v. Ray, 11 Paige, 235; Brooks v. Byam, 1 Story, 296–301; Langdon v. Goddard, 3 Story, 13; Haskell v. Haskell, 3 Cush. 542; Bethell v. Casson, 1 Hem. & M. 806. The following cases also illustrate the rule, in some of which the discovery was held to be material to plaintiff's case, and proper; in others not to be proper, because relating solely to defendant's defense: Owen v. Wynn, L. R. 9 Ch. Div. 29; Minet v. Morgan, L. R. 8 Ch. 361, 363, L. R. 11 Eq. 234; In re Leigh's Estate, L. R. 6 Ch. Div. 256; Great Western, etc., Co. v. Tucker, L. R. 9 Ch. 376; Kettlewell v. Barstow, L. R. 7 Ch. 686 (defendant was excused from producing a pedigree which he swore positively related solely to his own title, and showed nothing concerning the plain-

none. And in those cases in which the court of chancery had concurrent jurisdiction with the common-law courts upon legal titles, it was not available against either discovery or relief." It was accordingly held, affirming the judgment of the Court of Appeal (L. R. 33 Ch. Div. 323), that the defendants were obliged to make discovery. That a similar conclusion would be reached in all those American states where there has been a union of legal and equitable jurisdictions would seem necessarily to follow.

(a) Cited with approval in Kelley v. Boettcher, 85 Fed. 55, 29 C. C. A. 14; Smythe v. New Orleans C. & B. Co., 34 Fed. 825, affirmed, 141 U. S. 656, 12 Sup. Ct. 113.

(b) **Facts Must be Material to Plaintiff's Title.**— See also Benbow v. Low, L. R. 16 Ch. Div. 93 (not entitled to statement of defendant's evi-

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tiff's title by descent, which was in issue); Thompson v. Dunn, L. R. 5 Ch. 573; Chichester v. Marquis of Donegal, L. R. 5 Ch. 497; Wilson v. Thornbury, L. R. 17 Eq. 517; Murray v. Clayton, L. R. 15 Eq. 115 (in a suit for infringement on a patent right, after a decree in plaintiff's favor, dence); Bidder v. Bridges, L. R. 29 Ch. Div. 34. A plea that the documents which the bill seeks to discover do not relate to the plaintiff's case must be taken as true, unless the court can see from the nature of the case or of the documents that the party has misunderstood the effect of the documents; Roberts v. Oppenheim, L. R. 26 Ch. Div. 484. In Lyell v. Kennedy, L. R. 8 App. Cas. 217, reversing 20 Ch. Div. 484, the Court of Appeal (Brett, L. J., and Jessel, M. R.) had held that in an action of ejectment it was the settled practice that the plaintiff could not have discovery even as to his own title, on the ground that the "plaintiff in ejectment must rely on the strength of his own title"; but in the House of Lords it was shown that the practice was otherwise; citing Craw v. Tyrell, 2 Madd. 397; Wright v. Plumptre, 3 Madd. 481; Pennington v. Berchy, 2 Sim. & St. 282; Drake v. Drake, 3 Hare, 523; Bennett v. Glossop, 3 Hare, 578; Brown v. Wales, L. R. 15 Eq. 147; Butterworth v. Bailey, 15 Ves. 358.

To the effect that a bill cannot be maintained for what does not appertain to and is not necessary for the title of the plaintiff, but appertains to the title of the defendant, see Norfolk & W. R. Co. v. Postal Tel. Cable Co., 88 Va. 932, 14 S. E. 689; Sunset Telephone & T. Co. v. City of Eureka, 122 Fed. 961. As holding that plaintiff cannot seek discovery of matters beyond his own title, see also Kelley v. Boettcher, 85 Fed. 55, 29 C. C. A. 14. Accordingly it has been held that a plaintiff is not entitled to an inspection of the deeds upon which defendant bases his right. Ryder v. Bateman, 93 Fed. 31. That plaintiff is entitled to a discovery of defendant's title, see Stone v. Marshall Oil Co., 188 Pa. St. 614, 41 Atl. 748, 1119. A bill may be maintained for the discovery of a will under which plaintiff claims. Hanneman v. Richter, 62 N. J. Eq. 365, 50 Atl. 904. Or of choses in action in defendant's possession the nature of which plaintiff does not know. Smith v. Smith's Adm'r, 92 Va. 696, 24 S. E. 280. Courts of equity in patent cases sometimes grant an inspection of alleged infringing devices as incidental to ordinary discovery. Colgate v. Compagnie Francaise du Telegraphe, 23 Fed. 82. In Reynolds v. Burgess Sulphite Fibre Co., 71 N. H. 332, 93 Am. St. Rep. 535, 51 Atl. 1075, 57 L. R. A. 949, it was held that a plaintiff may have discovery of an article of personal property so that an expert may examine it before trial. The action at law was for negligence. In Plaster v. Throne-Franklin Shoe Co., 123 Ala. 360, 26 South. 225, discovery of assets was allowed as incidental to a creditor's bill. In Clark v. Equitable Life Assur. Soc., 76 Miss. 22, 23 South. 453, it was allowed to determine the profits of a mutual life insurance company, as incidental to an account. In Hartman v. Evans, 38 W. Va. 669, 18 S. E. 810, it was allowed to determine evidence may thereby be incidentally disclosed,[d] as, for example, where the establishment of the plaintiff's title or cause of action involves the proof of fraud; and the defendant, besides discovering what the case *is* on which he relies, can be compelled to disclose all facts which would, by way of evidence, tend to *impeach* or *destroy* it, unless otherwise privileged, since such facts are material evidence for his adversary, but is not bound to disclose any evidence by which he intends to or may *support* his case, for such evidence cannot be material to the plaintiff.[2] [e]

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establishing plaintiff's right, and enjoining the defendant, plaintiff is entitled to a discovery of all the patented articles sold by defendant, and of the names and addresses of their purchasers);[c] Brown v. Wales, L. R. 15 Eq. 142 (in a controversy concerning title to lands embraced in a certain conveyance, matters *identifying* the parcels of land in dispute are part of plaintiff's title, as well as matters showing the *devolution* of the estate); Wier v. Tucker, L. R. 14 Eq. 25; Girdlestone v. North Brit., etc., Ins. Co., L. R. 11 Eq. 197; Bovill v. Smith, L. R. 2 Eq. 459; Dixon v. Fraser, L. R. 2 Eq. 497; Saunders v. Jones, 7 Ch. Div. 435, 443.

[2] Stainton v. Chadwick, 3 Macn. & G. 575; Young v. Colt, 2 Blatch. 373. In Attorney-General v. Corporation of London, 2 Macn. & G. 247, 256, 257, 13 Beav. 313, Lord Cottenham states in a very clear and full manner the exact extent and limits of the plaintiff's right of discovery with respect to matter relating to the defendant's defense and title, and his opinion has been regarded accurate. The following more recent decisions will further illustrate this rule: In Hoffman v. Postill, L. R. 4 Ch. 673, it was held that although the plaintiff cannot have a discovery of the evidence in support of defendant's case, yet when the *defendant* files interrogatories, he may ask any questions tending to defeat the plaintiff's cause of action. While this decision does not claim that discovery by defendant is governed by any different principle, it plainly shows that more freedom is allowed to the defendant than to the plaintiff in investigating his adversary's case. To exactly the same effect is the decision in Commissioner, etc. v. Glasse, L. R. 15 Eq. 302. In Republic of Costa Rica v. Elanger, L. R. 19 Eq. 33, 44,

the true character of a loan, and to show usury.

"The plaintiff may restrict his prayer for discovery to any matter or part of the evidence to support his action that he may choose. It would be absurd to suppose that, if he files a bill for discovery, he must call upon the defendant for all the evidence necessary to support the plaintiff's action at law." Hurricane Tel. Co. v. Mohler, 51 W. Va. 1, 41 S. E. 421.

(c) To the same effect, see Saccharin Corporation v. Chemicals & Drugs Co., (1900) 2 Ch. 556.

(d) See Dock v. Dock, 180 Pa. St. 14, 36 Atl. 411, 57 Am. St. Rep. 617.

(e) Quoted in Edison Electric Light Co. v. U. S. Electric Light Co., 45 Fed. 55, 58.

As a direct inference of this general rule, all the facts which the plaintiff seeks to discover must be *material;* the defendant is never compelled to disclose matters which are *immaterial* as evidence to support the plaintiff's contention; he is never obliged to answer vexatious or impertinent questions, asked from curiosity or malice.[3] [f]

45, per Malins, V. C., while it was admitted that, in general, matters *simply* injurious to defendant's case could not be discovered, and that a mortgagee or *bona fide* purchaser for value, in a suit against him concerning the land, cannot be compelled to disclose *the title deeds* of the estate under which he holds, this general rule is subject to an exception; viz., when a *prima facie* case is stated impeaching the validity of these very deeds, on the ground of fraud, or some other ground which would establish the plaintiff's right, their discovery by the defendant will be compelled; citing, as illustrations of this doctrine, Beckford v. Wildman, 16 Ves. 438; Balch v. Symes, Turn. & R. 87; Bassford v. Blakesley, 6 Beav. 131, 133; Kennedy v. Green, 6 Sim. 6 (case of a *bona fide* purchaser, etc.); Latimer v. Neate, 11 Bligh, 112, 4 Clark & F. 570; Follett v. Jefferyes, 1 Sim., N. S., 1; Freeman v. Butler, 33 Beav. 289; Crisp v. Platel, 8 Beav. 62. And on the rule that defendant must disclose matters aiding the plaintiff's cause of action, even though they may also affect his own title or defense, see Brown v. Wales, L. R. 15 Eq. 142; Smith v. Duke of Beaufort, 1 Hare, 507; Earp v. Lloyd, 3 Kay & J. 549; Lowndes v. Davies, 6 Sim. 468.

[3] Finch v. Finch, 2 Ves. Sr. 492; Richards v. Jackson, 18 Ves. 472; Janson v. Solarte, 2 Younge & C. 127; Montagùe v. Dudman, 2 Ves. Sr. 399; Gelston v. Hoyt, 1 Johns. Ch. 548, 549; Lindsley v. James, 3 Cold. 477; Wier v. Tucker, L. R. 14 Eq. 25; Minet v. Morgan, L. R. 8 Ch. 361; Republic of Costa Rica v. Erlanger, L. R. 19 Eq. 33; as, for example, in suits against vendors or manufacturers for infringing upon plaintiff's trademark, the names of defendant's customers who have bought the article need not be disclosed: Carver v. Pinto Leite, L. R. 7 Ch. 90; Moore v. Craven, L. R. 7 Ch. 94, note; but see Murray v. Clayton, L. R. 15 Eq. 115;[g] and see Jeremy's Eq. Jur. 265. This special rule should not be understood as requiring that the *discovery itself* must be material in the sense that the

(f) Equity will not compel discovery of irrelevant matters. Alexander v. Mortgage Co., 47 Fed. 131. In Gorman v. Bannigan, 22 R. I. 22, 46 Atl. 38, the plaintiff sought a discovery of the value of an estate in aid of an action at law for legal services. It was held that the evidence sought was immaterial to the issue and that the bill could not be maintained. In this case the court said: "Moreover, it is not sufficient, in a bill of discovery, for the complainant to allege that the matters as to which a discovery is sought are material to the proving of his action at law, but he must state his case in such a manner that the court will be able to see how such matters may be material on the trial thereof."

(g) Also, Saccharin Corporation v. Chemicals & Drugs Co., (1900) 2 Ch. 556; *ante*, notes 1 and (c) to this paragraph.

§ 202. As a general proposition, the discovery, in order to be granted, must be in aid of some object which a court of equity can regard with approval, or at least without disapproval,— some object which is not opposed to good morals or to the principles of public policy embodied in the law.[1] This doctrine is the foundation of several particular rules regulating the practice of discovery. The first of these particular applications of the doctrine is, that a defendant in the discovery suit, or in a suit for relief as well as discovery, is never compelled to disclose facts which would tend to criminate himself, or to expose him to criminal punishment or prosecution, or to pains, penalties, fines, or forfeitures. He may refuse an answer, not only to the main, directly criminating facts, but to every incidental fact which might form a link in the chain of evidence establishing his liability to punishment, penalty, or forfeiture.[2] [a] This restriction upon the right to a discovery

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plaintiff has no other way of obtaining the evidence; it has been shown that a suit for discovery may be maintained solely on the ground of *convenience*, and need not be rested on any necessity. For further illustrations of the text, see cases cited in last note.

[1] Jeremy's Eq. Jur. 268; King v. Burr, 3 Mer. 693; Cousins v. Smith, 13 Ves. 542; Rejah v. East India Co., 35 Eng. L. & Eq. 283.

[2] Jeremy's Eq. Jur. 265–268; Currier v. Concord, etc., R. R., 48 N. H. 321; Black v. Black, 26 N. J. Eq. 431; East India Co. v. Campbell, 1 Ves. Sr. 246; Claridge v. Hoare, 14 Ves. 59, 65; Fisher v. Owen, L. R. 8 Ch. Div. 646; Christie v. Christie, L. R. 8 Ch. 499; Lichfield v. Bond, 6 Beav. 88; Short v. Mercier, 3 Macn. & G. 205; Glynn v. Houston, 1 Keen, 329; United States v. Saline Bank, 1 Pet. 100; Horsburg v. Baker, 1 Pet. 232–236; Greenleaf v. Queen, 1 Pet. 138; Ocean Ins. Co. v. Fields, 2 Story, 59; Stewart v. Drasha, 4 McLean, 563; Union Bank v. Barker, 3 Barb. Ch. 358; Northrup v. Hatch, 6 Conn. 361; Skinner v. Judson, 8 Conn. 528; Poindexter v. Davis, 6 Gratt. 481; Higdon v. Heard, 14 Ga. 255; Marshall v. Riley, 7 Ga. 367; King of the Sicilies v. Wilcox, 1 Sim., N. S., 301; United States v. McRae, L. R. 3 Ch. 79.

(a) Quoted in Robson v. Doyle, 191 Ill. 566, 61 N. E. 435. See United States v. National Lead Co., 75 Fed. 94; Daisley v. Dun, 98 Fed. 497 (answers would lay defendant open to prosecution for libel); Marsh v. Davison, 9 Paige, 580; Thompson v. Whitaker Iron Co., 41 W. Va. 574, 23 S. E. 795; Cross v. McClenahan, 54 Md. 21. It has been held that in order that the defendant may be excused from answering "it must appear, either by the bill of the complainant, or by the plea of the defendant, that his answer is subject to several limitations and exceptions necessary in order to promote the ends of justice. A defendant is always compelled to disclose his frauds and fraudulent practices, when such evidence is material to the plaintiff's case, even though the fraud might be so great as to expose the defendant to a prosecution for conspiracy, unless perhaps the indictment was actually pending.[3] [b] And a party may have so contracted that he has thereby bound himself to make discovery, although it might subject him to pecuniary penalties.[4] Some other grounds of limitation or exception are stated in the note.[5]

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[3] Dummer v. Corp'n of Chippenham, 14 Ves. 245; Lee v. Read, 5 Beav. 381; Janson v. Solarte, 2 Younge & C. 132, 136; Green v. Weaver, 1 Sim. 404, 427, 432; Mitchell v. Koecker, 11 Beav. 380; Robinson v. Kitchen, 35 Eng. L. & Eq. 558; Currier v. Concord, etc., R. R., 48 N. H. 321; Attwood v. Coe, 4 Sand. Ch. 412; Skinner v. Judson, 8 Conn. 528, 21 Am. Dec. 691; Howell v. Ashmore, 9 N. J. Eq. 82, 57 Am. Dec. 371; O'Connor v. Tack, 2 Brewst. 407.

[4] Green v. Weaver, 1 Sim. 404; Lee v. Read, 5 Beav. 381.

[5] Where the liability to a penalty is barred by lapse of time, or where the right to it held by the plaintiff has been waived by him: Trinity House Corp'n v. Burge, 2 Sim. 411; Skinner v. Judson, 8 Conn. 528, 21 Am. Dec. 691; Northrop v. Hatch, 6 Conn. 361; Dwinal v. Smith, 25 Me. 379; Mitford's Eq. Pl. 195–197. Or when the penalty is in reality only liquidated damages: Mitford's Eq. Pl. 195–197. And if the so-called forfeiture is merely the termination or change of the party's interest under some conditional limitation, the rule does not apply; e. g., a gift to a woman during her widowhood, and if she marry, then over, she must disclose whether she has married: Hurst v. Hurst, L. R. 9 Ch. 762; Chauncey v. Tahourden, 2 Atk. 392; Lucas v. Evans, 3 Atk. 260; Hambrook v. Smith, 17 Sim. 209. Also where gaming, stock-jobbing, and the like, have been made illegal by statute, and parties engaging therein liable to certain pecuniary penalties or forfeit-

may subject him to punishment, or he will be compelled to make the discovery asked for in the bill. As if a bill states a marriage of the defendant with a particular woman, this is of itself no offense; but if he pleads that she is his sister, that fact would constitute the alleged marriage a criminal act, and he may refuse to state anything more, or to speak as to any fact or circumstance which may form a link in the chain." Wolf v. Wolf's Ex'r, 12 Har. & G. 382.

That discovery may be had in aid of an action for a *personal tort*, where it will not expose the defendant to the liabilities mentioned in the text, see Reynolds v. Burgess Sulphite Fibre Co., 71 N. H. 332, 51 Atl. 1075, 93 Am. St. Rep. 535, 57 L. R. A. 949, and cases cited, *ante*, note (a), § 197.

(b) See also Leitch v. Abbott, L. R. 31 Ch. Div. 374; Postlethwaite v. Rickman, L. R. 35 Ch. Div. 744. Before the defendant can be compelled to discover concerning the transaction

§ 203. **Privileged Communications.**— Another application of the general doctrine concerning public policy is, that no disclosure will be compelled of matters a knowledge of which has been communicated or obtained through or by means of certain close confidential relations, which are carefully guarded and protected from invasion or interference by the general policy of the law. For this reason a married woman cannot be compelled to disclose facts tending to establish any liability of her husband, the knowledge of which was acquired by her through her marital relation.[1] On the same foundation of principle rests the important rule that a party will not be compelled to disclose the legal advice given him by his attorney or counsel, nor the facts stated or matters communicated between himself and them in reference to the pending suit, or to the dispute which has resulted in the present litigation; nor, on the other hand, will these professional advisers be compelled or permitted to disclose the matters which they have learned or commu-

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ures, a discovery is authorized by the statute, although it might expose the defendant to such possible liabilities, and therefore a suit for discovery of sums lost at play, or by stock-jobbing operations, and of securities given therefor, may be maintained: Mitford's Eq. Pl. 288; Rawden v. Shadwell, Amb. 268; Newman v. Franco, 2 Anstr. 519; Andrews v. Berry, 3 Anstr. 634, 635; but see Short v. Mercier, 3 Macn. & G. 205; Robinson v. Lamond, 15 Jur. 240.

[1] By the ancient law, a married woman could not testify in any civil proceeding either for or against her husband, no matter when, or where, or how she became informed of the facts. Under modern statutes permitting her to be a witness generally in suits to which he is a party, the limitation upon her discovery would doubtless extend, as stated in the text, only to those matters of which she obtained a knowledge through the confidences of the marital relation: See Le Texier v. Margrave of Anspach, 5 Ves. 322, 15 Ves. 159; Cartwright v. Green, 8 Ves. 405, 408; Barron v. Grillard, 3 Ves. & B. 165.

claimed by the plaintiff to be fraudulent, it is not necessary that the bill should allege the particulars of the fraud: Leitch v. Abbott, L. R. 31 Ch. Div. 374; White v. Ahrens, L. R. 26 Ch. Div. 717. Nor can the defense of privileged communications be set up to defeat discovery, where the communication is made in a fraudulent transaction: Postlethwaite v. Rickman, L. R. 35 Ch. Div. 744; Williams v. Imbrada Land and Copper Co., (1895) 2 Ch. 751. See this subject further discussed, *post*, § 203, note.

nicated in the same manner.[2] [a] With respect to the nature of the matter passing between the client and his attorney or counsel, the protection is not absolute nor universal. The privilege from disclosure embraces those matters alone "in which it is lawful for the client to ask and the solicitor to give professional advice "; [d] and therefore communications by which fraud is contrived or arranged between a lawyer and client are wholly excluded from the privilege, and must be divulged.[3] With respect to the time at which the communication must be made in order to be protected, there has been no little fluctuation among the decisions, and the rule cannot even now be considered as settled with certainty

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[2] Bulstrode v. Letchmore, 3 Freem. 5, 1 Cas. Ch. 277; Parkhurst v. Lowten, 2 Swanst. 194, 216; Sandford v. Remington, 2 Ves. 189; Wilson v. Northampton, etc., R'y Co., L. R. 14 Eq. 477; McFarlan v. Rolt, L. R. 14 Eq. 580; Minet v. Morgan, L. R. 8 Ch. 361; Currier v. Concord, etc., R. R., 48 N. H. 321. As to the persons between whom the privilege exists, the matters must have been communicated between a client and his professional legal adviser, or some person acting at the time as that legal adviser's agent or clerk, and may be made to such legal adviser *personally*, or through the means of any intermediate agent employed expressly to make the communication, either by writing or orally: Anderson v. Bank of Br. Columbia, L. R. 2 Ch. Div. 644; Wilson v. Northampton, etc., R'y Co., L. R. 14 Eq. 477; McFarlan v. Rolt, L. R. 14 Eq. 580; Jenkyns v. Bushby, L. R. 2 Eq. 547; Goodall v. Little, 1 Sim., N. S., 155; Lafone v. Falkland Islands Co., 4 Kay & J. 34; Reid v. Langlois, 1 Macn. & G. 627; Russell v. Jackson, 9 Hare, 387; Bank of Utica v. Mersereau, 3 Barb. Ch. 528, 49 Am. Dec. 189; Crosby v. Berger, 11 Paige, 377, 42 Am. Dec. 117; March v. Ludlum, 3 Sand. Ch. 35; Stuyvesant v. Peckham, 3 Edw. Ch. 579; Parker v. Carter, 4 Munf. 273, 6 Am. Dec. 513; and communications between the party's predecessors in title and their attorneys have been held privileged: Minet v. Morgan, L. R. 8 Ch. 361.[b] Communications made to or from, or in the hearing of, the following persons have been held not to come within the rule, and not to be privileged. The attorney's son, who happened to be present in his father's office, but not connected with him in business: Goddard v. Gardner, 28 Conn. 172; a stranger who happened to be present at the conversation with the attorney: Jackson v. French, 3 Wend. 337, 20 Am. Dec. 699; a confidential clerk of the party: Corps v. Robinson, 2 Wash. C. C. 388; from a business managing agent of the party: Anderson v. Bank of Br. Columbia, L. R. 2 Ch. Div. 644; but see Ross v. Gibbs, L. R. 8 Eq. 522; between two co-defendants after suit brought: Hamilton v. Nott, L. R. 16 Eq. 112; between defendants for the purpose of being laid before

(a) See Nat. Bank of West Grove v. Earle, 196 Pa. St. 217, 46 Atl. 268; Calcraft v. Guest, (1898) 1 Q. B. 759, 67 L. J. Q. B. 505, 78 L. T. (N. S.) 283, 46 Wkly. Rep. 420; Lyell v. Kennedy, L. R. 27 Ch. Div. 1; Kennedy v. Lyell, L. R. 23 Ch. Div. 387, affirmed, L. R. 9 App. Cas. 81. In the last case it was decided that no discovery can be compelled where the party swears that he has no knowledge or information with regard to the matters inquired of, except such as he has derived from privileged communications made to him by his solicitors or their agents, and that a *belief* founded on such knowledge or information is protected.

(b) See also Calcraft v. Guest, (1898) 1 Q. B. 759, 67 L. J. Q. B. 505, 78 L. T. (N. S.) 283, 46 Wkly. Rep. 420.

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their attorney: Goodall v. Little, 1 Sim., N. S., 155; but see Jenkyns v. Bushby, L. R. 2 Eq. 547; between the attorneys of the opposite parties: Gore v. Bowser, 5 De Gex & S. 30. Not only must one of the persons be a legal professional man, but the relation of client and professional adviser must actually be subsisting at the time the communication is made; therefore a communication will not be privileged if made to an attorney at law, who is acting simply as a friend of the person making it: Coon v. Swan, 30 Vt. 6; nor if made after the actual relation of client and lawyer has ceased: Yordan v. Hess, 13 Johns. 492; and the communication must be made to the lawyer in consequence of and in respect of his professional character: Bunbury v. Bunbury, 2 Beav. 173; Greenlaw v. King, 1 Beav. 137; Dartmouth v. Holdsworth, 10 Sim. 476. In order to be entitled to the privilege, the matter need not be communicated *personally* between the client and his legal adviser; it may pass between them through an agent: Anderson v. Bank of Br. Columbia, L. R. 2 Ch. Div. 644, per Jessel, M. R.; Bunbury v. Bunbury, 2 Beav. 173; Steele v. Stewart, 1 Phill. Ch. 471; Goodall v. Little, 1 Sim., N. S., 155; Russell v. Jackson, 9 Hare, 387; Jenkyns v. Bushby, L. R. 2 Eq. 547.[c]

[3] Reynell v. Sprye, 10 Beav. 51, 11 Beav. 618; Gartside v. Outram, 26 L. J. Ch. 113.[e] But where the fraud was entirely on the part of the client, was not

(c) See also Lyell v. Kennedy, L. R. 23 Ch. Div. 382, affirmed in L. R. 9 App. Cas. 81.

(d) The privilege from discovery does not extend to facts communicated by a solicitor to his client which cannot be the subject of a confidential communication between them, even though such facts have a relation to the case of the client in the action: Foakes v. Webb, 28 Ch. Div. 287. So held as to information derived by the client from his solicitor of the fact that the solicitor had had correspondence with the solicitor of his adversary concerning the subject-matter of the action.

(e) Bullivant v. Attorney-General, (1901) App. Cas. (H. L.) 196 (no proof or definite charge of any fraud or illegality to displace the privilege), reversing Reg. v. Bullivant, (1900) 2 Q. B. 163, 69 L. J., Q. B., 657, 82 L. T. (N. S.) 493 ("the privilege does not extend to communications which came into existence for the purpose of the client's procuring advice as to the mode in which he might evade the provisions of a colonial statute imposing a duty in respect of property"), and following Simms v. Registrar of Probates, (1900) App. Cas. (Privy Coun.) 323; Williams v. Imbrada R. R. Land & Copper Co., (1895) 2 Ch. 751; Postlethwaite v. Rickman, L. R. 35 Ch. Div. 744.

and uniformity, both throughout all the states of this country and England, although it is settled at last in England by the most recent decisions. It is well established that a lawyer who has been consulted professionally will not be compelled nor permitted to disclose the matters passing between himself and the client, at whatever time the communication was made, whether during the pendency of the litigation, or in contemplation of a litigation, after the dispute resulting in it had begun, or even before any dispute had arisen or any litigation was anticipated.[4] It is equally well established that the client cannot be compelled to disclose the advice or opinion which he has at any time professionally received from his legal adviser.[5] The fluctuation and discrepancy in the decisions relate to the liability of the client to make discovery of the matters which he has himself laid before his attorney or counsel

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imputed to the attorney, and was therefore collateral to the communication between them, the communication was held to be privileged: Mornington v. Mornington, 2 Johns. & H. 697. In the very recent case of Anderson v. Bank of British Columbia, L. R. 2 Ch. Div. 644, the doctrine of privileged communications as it now stands under the modern decisions, and according to the new procedure substituted in place of the "bill of discovery," was fully examined by Sir George Jessel, M. R. The following cases also illustrate what is and what is not privileged: Private and confidential letters from a stranger to defendant must be produced by him, *although the sender forbid;* but plaintiff may be required to give an undertaking not to use them for other purposes than as requisite for his litigation: Hopkinson v. Lord Burghley, L. R. 2 Ch. 447; as to letters being the joint property of sender and receiver, see Pope v. Curl, 2 Atk. 342; but that the sender cannot prevent their production when required for the ends of justice, see Gee v. Pritchard, 3 Swanst. 402; Williams v. Prince of Wales Life Ins. Co., 23 Beav. 338. On the general rule as to what is privileged: Cossey v. London, etc., R'y, L. R. 5 Com. P. 146 (report of the company's medical man about an accident to plaintiff); Smith v. Daniell, L. R. 18 Eq. 649 (letters written to counsel, but not sworn to be "confidential"); Heath v. Crealock, L. R. 15 Eq. 257 (attorney of a defendant who had absconded not compelled to disclose his address, so that plaintiff might make personal service of process on him, although a personal service was required by the practice).

[4] The rule is thus settled whether the lawyer is examined as an ordinary witness, or whether he is joined as a party defendant for purpose of discovery: Herring v. Clobery, 1 Phill. Ch. 91; Jones v. Pugh, 1 Phill. Ch. 96; Greenough v. Gaskell, 1 Mylne & K. 98.

[5] Ibid.

as the basis of professional advice. It was at one time settled by the decisions, and the rule was generally understood and acted upon, both in England and in the United States, and perhaps is still so acted upon in this country, that statements of fact made to a lawyer, and even written "cases" laid before him for his opinion, before any *dispute* has arisen, and therefore not in contemplation of an impending or anticipated litigation, are not embraced within the privilege, but must be disclosed or produced by the client at the instance of his adversary in any subsequent judicial controversy.[6] Whatever may be thought of the correctness of this particular rule, it is well settled in England, and generally in the United States, that facts stated or communications made by a client to his lawyer, either personally or by means of an intermediate agent, concerning the controversy, while a litigation is actually pending, or before the litigation has commenced, *but after the dispute* has arisen which tends to a litigation, *and in contemplation of such anticipated* litigation, are entitled to the privilege on the part of the client who communicates, as well as on the part of the attorney or counselor who receives. The client cannot be compelled to discover the facts stated, nor to produce the written case submitted for professional advice and opinion, under these circumstances.[7] There has always been much dissatisfaction with these doctrines supposed to have been established upon authority of the house of lords, both among the profession and the judges, and this opposition has finally triumphed. It is now settled by the latest decisions in England, that a party will not be compelled to disclose matters otherwise privileged, confidentially communicated, relating to questions connected with an existing judicial controversy, although the communication was made before any *dispute* arose, and was therefore not in contemplation or anticipation of any impending or expected litigation.[8] Upon the same consideration of public policy controlling discovery, the rule is settled that governmental officers, whether civil or military, are not compelled to disclose matters of state, where the public interests might be harmed by such a disclosure, at the suit of a private individual.[9]

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[6] Radcliffe v. Fursman, 2 Brown Parl. C. 514; Bolton v. Corporation of Liverpool, 3 Sim. 467, 1 Mylne & K. 88; Greenough v. Gaskell, 1 Mylne & K. 98, 115, per Lord Brougham; Walker v. Wildman, 6 Madd. & G. 47, per Sir John Leach; Knight v. Waterford, 2 Younge & C. 39, per Lord Abinger; Hawkins v. Gathorcole, 1 Sim., N. S., 150; Lord Walsingham v. Goodricke, 3 Hare, 122; Paddon v. Winch, L. R. 9 Eq. 666. Radcliffe v. Fursman, 2 Brown Parl. C. 514, is the leading case in which the rule is supposed to have been laid down, and the subsequent decisions have been made wholly upon its authority as the judgment of the highest appellate court, the judges considering themselves bound by it, although denying its correctness *on principle*, and sometimes severely criticising it: See Richards v. Jackson, 18 Ves. 474; Preston v. Carr, 1 Younge & J. 179; Newton v. Berresford, 1 Younge, 378; and per Lord Brougham and Lord Abinger, in the cases cited above. But in truth no such general rule was laid down or involved in the case of Radcliffe v. Fursman, 2 Brown Parl. C. 514; and the subsequent decisions made upon its authority have proceeded upon an entire misapprehension of its facts. This result is established in the most convincing manner by the writer of an article in the Law Magazine, vol. 17, p. 51 (Feb., 1837), who, by a masterly analysis of Radcliffe v. Fursman, 2 Brown Parl. C. 514, and of subsequent cases, demonstrates the correctness of his conclusion. These views of the article referred to have been fully adopted, and the authority of Radcliffe v. Fursman, 2 Brown Parl. C. 514, and of the cases following it, has been completely overthrown by the very recent English decisions cited in a subsequent note.

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[7] Bolton v. Corporation of Liverpool, 3 Sim. 467, 1 Mylne & K. 88; Greenough v. Gaskell, 1 Mylne & K. 98, 115; Warde v. Warde, 1 Sim., N. S., 18, 3 Macn. & G. 365; Bluck v. Galesworthy, 2 Giff. 453; Jenkyns v. Bushby, L. R. 2 Eq. 547; McLellen v. Longfellow, 32 Me. 494, 54 Am. Dec. 599; McMannus v. State, 2 Head, 213. Notwithstanding the strong current of modern authority, and the tendency to maintain and even to extend the privilege, it has still been held that no statements are protected from disclosure unless made during the *actual pendency* of a judicial proceeding to which they relate: Whiting v. Barney, 30 N. Y. 330, 86 Am. Dec. 385.

[8] This conclusion was reached by the court of appeal in chancery, in Minet v. Morgan, L. R. 8 Ch. 361, in a most able opinion by Lord Chancellor Selborne, which contains a thorough review of the leading decisions, and discussion of the subject on principle, and overthrows the supposed authority of Radcliffe v. Fursman, 2 Brown Parl. C. 514, and cases which had followed it. The same view is maintained in the following cases, some of them decided before and some after Minet v. Morgan, L. R. 8 Ch. 361, viz.: Pearse v. Pearse, 1 De Gex & S. 12; Lawrence v. Campbell, 4 Drew. 485; McFarlan v. Rolt, L. R. 14 Eq. 580; Turton v. Barber, L. R. 17 Eq. 329; Wilson v. Northampton, etc., R'y Co., L. R. 14 Eq. 477; Walsham v. Stainton, 2 Hem. & M. 1; Manser v. Div, 1 Kay & J. 451.(f)

In addition to the cases heretofore cited, the following are illustrations of the general doctrines concerning confidential communications which are privileged: Nias v. Northern, etc., R'y Co., 3 Mylne & C. 355, 357, per Lord

(f) See also Calcraft v. Guest, (1898) 1 Q. B. 759, 67 L. J. (Q. B.) 505, 48 L. T. (N. S.) 283, 46 Wkly. Rep. 420; Goldstone v. Williams, Deacon & Co., (1899) 1 Ch. 47.

§ 204. **Manner of Making Discovery.**— Having thus ascertained what matters are exempt from a discovery, and of what a discovery will be compelled, it remains to consider certain settled rules concerning the *manner* in which the discovery must be made by the defendant. 1. Assuming that the matters called for are proper subjects of a discovery; that they belong to the plaintiff's case, and not to the defendant's; that they are not privileged, or are not exempt within the operation of any other doctrine,— then the defendant must disclose *all* material facts; in other words, if he answers at all, he must answer fully. The court will, however, in the exercise of its discretion, judge of the materiality, and guard him against oppressive, vexatious, or impertinent inquiries.[1] 2. The answers of the defendant

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Cottenham; Flight v. Robinson, 8 Beav. 22; Reynell v. Sprye, 10 Beav. 51; Simpson v. Brown, 33 Beav. 482; Calley v. Richards, 19 Beav. 401; Beadon v. King, 17 Sim. 34; Goodall v. Little, 1 Sim., N. S., 155; Garland v. Scott, 3 Sim. 396; Gresley v. Mousley, 2 Kay & J. 288; Lafone v. Falkland Islands Co., 4 Kay & J. 34; Russell v. Jackson, 9 Hare, 387; Chant v. Brown, 9 Hare, 790; Glyn v. Caulfield, 3 Macn. & G. 463; Storey v. Lord Lennox, 1 Mylne & C. 525; Burrell v. Nicholson, 1 Mylne & K. 680; Hughes v. Biddulph, 4 Russ. 190; Herring v. Clobery, 1 Phill. Ch. 91; Thompson v. Falk, 1 Drew. 21; Charlton v. Coombes, 4 Giff. 372; Nicholl v. Jones, 2 Hem. & M. 588; Combe v. Corporation of London, 15 L. J. Ch. 80; Ross v. Gibbs, L. R. 8 Eq. 522; Parker v. Carter, 4 Munf. 273, 6 Am. Dec. 513; Chew v. Farmers' Bank, 2 Md. Ch. 231; Williams v. Fitch, 18 N. Y. 546.[a]

[9] Smith v. East India Co., 1 Phill. Ch. 50; Rajah of Coorg v. East India Co., 25 L. J. Ch. 345, 365; and see Marbury v. Madison, 1 Cranch, 49.

[1] This particular rule, however, is chiefly one of practice in framing an answer, and applies to suits for discovery *and* relief, as well as those for

(a) See also Ainsworth v. Wilding, (1900) 2 Ch. 315, 69 L. J. Ch. 695, 49 Wkly. Rep. 539; Goldstone v. Williams, (1898) 1 Ch. 47, 68 L. J. Ch. 24, 79 L. T. (N. S.) 373, 47 Wkly. Rep. 91 (as to notes of proceedings in open court). As to the inspection of affidavits in a court of lunacy, at the discretion of the court, see In re Strachan, (1895) 1 Ch. 441. That *trade secrets* are privileged, see Federal Mfg. & Printing Co. v. International Bank Note Co., 119 Fed. 385.

must be complete, so that the information which they give will be of substantial use to the plaintiff;[2] and must be to the best of the defendant's knowledge, information, and belief. A defendant is bound to obtain information from all means reasonably within his power. If documents are ordered to be produced, it is no excuse for non-production that they are in the possession of a third person, or even that a third person has a lien upon or an interest in them.[3]

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a discovery alone. It means that if the defendant does not raise any question by plea or demurrer to the bill, but answers, he must make a full discovery as to all matters inquired of; he cannot, in his answer, deny a portion of the plaintiff's allegations, and then claim that a discovery as to such portion is made immaterial: Saunders v. Jones, L. R. 7 Ch. Div. 435, 443; Lancaster v. Evors, 1 Phill. Ch. 349; Reade v. Woodruffe, 24 Beav. 421; Chichester v. Marquis of Donegal, L. R. 4 Ch. 416, L. R. 5 Ch. 497; Thompson v. Dunn, L. R. 5 Ch. 573; Carver v. Pinto Leite, L. R. 7 Ch. 90; Elmer v. Creasy, L. R. 9 Ch. 69, and cases cited per Lord Selborne; Saull v. Browne, L. R. 9 Ch. 364; Hurst v. Hurst, L. R. 9 Ch. 762; Moore v. Craven, L. R. 7 Ch. 94, note; Hichens v. Congreve, 4 Russ. 562; West of Eng., etc., Bank v. Nickolls, L. R. 6 Ch. Div. 613; Marquis of Donegal v. Stewart, 3 Ves. 446; Brookes v. Boucher, 8 Jur., N. S., 639; Inglessi v. Spartali, 29 Beav. 564; Wier v. Tucker, L. R. 14 Eq. 25, and cases cited; Meth. Epis. Church v. Jaques, 1 Johns. Ch. 65; Phillips v. Provost, 4 Johns. Ch. 205; Cuyler v. Bogert, 3 Paige, 186; Bank of Utica v. Mersereau, 7 Paige, 517; King v. Ray, 11 Paige, 235; Champlin v. Champlin, 2 Edw. Ch. 362; Waring v. Suydam, 4 Edw. Ch. 426; Brooks v. Byam, 1 Story, 296; Langdon v. Goddard, 3 Story, 13; Kittridge v. Claremont Bank, 3 Story, 590; Wootten v. Burch, 2 Md. Ch. 190; Hagthorp v. Hook, 1 Gill & J. 272; Salmon v. Clagett, 3 Bland, 142; Robertson v. Bingley, 1 McCord Eq. 333; French v. Rainey, 2 Tenn. Ch. 641; Shotwell v. Struble, 21 N. J. Eq. 31; Walter v. McNabb, 1 Heisk. 703.

[2] As, for example, when accounts are called for, they must be reasonably made out, and not simply the books through which the items are scattered, produced for inspection: White v. Williams, 8 Ves. 193; Attorney-General v. East Retford, 2 Mylne & K. 35; Drake v. Symes, John. 647; but this is a matter under the discretionary control of the court, and a defendant will not be subjected to unreasonable labor and expense: See Christian v. Taylor, 11 Sim. 401.

[3] Glengall v. Frazer, 2 Hare, 99; Stuart v. Bute, 11 Sim. 442; Taylor v. Rundell, Craig & P. 104, 1 Phill. Ch. 222; Clinch v. Financial Corporation, L. R. 2 Eq. 271. Where a defendant, who was bound to produce certain documents, had become a bankrupt, and had changed his attorneys, and the documents were in the possession of his former attorneys, who had a lien upon them for their charges, this was held to be no excuse, and he was ordered to produce them: Vale v. Oppert, L. R. 10 Ch. 340, 342; but James, L. J., said that an attorney cannot set up his lien as against the right of

But if documents *belong* wholly or in part to a third person, not a party to the suit, their production will not be compelled.[4] 3. The answers must be distinct, positive in their statements, not leaving facts to be inferred argumentatively, and giving specific replies to specific questions;[5] but must not be unnecessarily minute and prolix, especially in setting forth accounts.[6]

§ 205. **Production and Inspection of Documents.**[a]—A branch of this general subject of discovery is the doctrine concerning the production and submission to inspection by

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other parties to have a production; and to the same effect is Belaney v. Ffrench, L. R. 8 Ch. 918. See also, as to the production of documents in the possession of third persons, etc., Ex parte Shaw, Jacob, 270; Rodick v. Gandell, 10 Beav. 270; Palmer v. Wright, 10 Beav. 234; North v. Huber, 7 Jur., N. S., 767; In re Williams, 7 Jur., N. S., 323; Liddell v. Norton, 23 L. J. Ch. 169; Bethell v. Casson, 1 Hem. & M. 806. It is no excuse for the non-production of documents that third persons, not parties to the suit, are *interested* in them: Kettlewell v. Barstow, L. R. 7 Ch. 686. Answers on information and belief may be required: Fry v. Shehee, 55 Ga. 208.

[4] Hadley v. McDougall, L. R. 7 Ch. 312; Warrick v. Queen's College, L. R. 4 Eq. 254; Vyse v. Foster, L. R. 13 Eq. 602; but the nature and extent of such third person's ownership must be explained when this excuse is set up: Bovill v. Cowan, L. R. 5 Ch. 495.

[5] Faulder v. Stuart, 11 Ves. 296; Wharton v. Wharton, 1 Sim. & St. 235; Tipping v. Clarke, 2 Hare, 383, 389; Anonymous, 2 Younge & C. 310; Duke of Brunswick v. Duke of Cambridge, 12 Beav. 281.

[6] Norway v. Rowe, 1 Mer. 346; Byde v. Masterman, Craig & P. 265; but documents are sometimes permitted to be given *in extenso:* See Parker v. Fairlie, 1 Sim. & St. 295; Lowe v. Williams, 2 Sim. & St. 574.

(a) **Personal and Real Property, other than Documents, in Defendant's Possession.**— The right to the production and inspection of property, other than documents, in the possession of the defendant in a bill of discovery, was examined with great care in the recent case of Reynolds v. Burgess Sulphite Fiber Co., 71 N. H. 332, 51 Atl. 1075, 93 Am. St. Rep. 535, 57 L. R. A. 949. The following are the chief points in the opinion of the court, by Chase, J.: The right of discovery in respect of documents does not depend upon the fact that the documents are muniments of title to property in dispute in the action at law, or that they are relevant to an accounting between the parties sought in such action: Anonymous, 2 Ves. Sr. 620; Moodalay v. Morton, 1 Bro. C. C. 469; Burrell v. Nicholson, 1 Mylne & K. 680; Storey v. Lennox, 1 Mylne & C. 523; Smith v. Beaufort, 1 Hare, 507; Chadwick v. Bowman, L. R. 16 Q. B. Div. 561; Peck v. Ashley, 12 Met. 478. Discovery of personal property other than documents was had in Marsden v. Panshall, 1 Vern. 407 (1686); Macclesfield v. Davis, 3 Ves. & B. 16, and in the following patent cases: Bovill the plaintiff of documents which the defendant admits to be in his possession, and which are liable to a discovery. I shall state the particular rules regulating the operation of this doctrine, without repeating those which are common to it, and to all other kinds of discovery.[1] It should be carefully borne in mind that the doctrine concerning the production and inspection of documents relates entirely to their disclosure for the purpose of being used as evidence, or to aid in the trial of a pending or contemplated litigation, and has no connection whatever with the ownership of or final right of possession to the documents in question.[b] In most instances, the ownership of the documents sought to be produced will not be at all in issue. But even in an action expressly brought to establish the plaintiff's title to documents and to recover their possession, the production of them before the hearing must be governed by the settled rules as to discovery. The plaintiff has otherwise no right to possess or to see them until a decree is rendered in his favor; for such right is the very matter in issue, and to decide that it existed would be to decide the whole merits of the controversy upon a preliminary application. It is well settled, therefore, that the matter of the production and inspection of documents depends upon the same principles and doctrines which govern discovery in general.[2]

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[1] The rules as to materiality, as to purposes for which a disclosure is proper, as to what is privileged, and the like, apply with equal force to this and to other instances of discovery. In fact, a large number of the decisions already cited illustrating these rules relate directly to the production of documents.

v. Moore, 2 Coop. Ch. Cas. 56 (Lord Eldon); Browne v. Moore, 3 Bligh, 178; Russell v. Cowley, 1 Web. Pat. Cas. 457; Morgan v. Seaward, 1 Web. Pat. Cas. 167; Patent Type Founding Co. v. Walter, John. 727. Inspection of real property was ordered in Lonsdale v. Curwen, 3 Bligh, 168; Walker v. Fletcher, 3 Bligh, 172; East India Co. v. Kynaston, 3 Bligh, 153; Attorney-General v. Chambers, 12 Beav. 159; Lewis v. Marsh, 8 Hare, 97. It is immaterial, in such cases, that the complainant has no interest in the property to be inspected. In the principal case it was held that a bill would lie to compel the right of inspection of fragments of machinery in the possession of the defendant, in aid of the proper preparation of the plaintiff for a trial of a suit at law for personal injuries caused by the defendant's negligence.

(b) Cited to this effect in Reynolds v. Burgess Sulphite Fibre Co., 71 N. H. 332, 51 Atl. 1075, 57 L. R. A. 949, 93 Am. St. Rep. 535. An inspection of books, etc., can be had only in aid of a prosecution or defense in litigation pending or contemplated. Fuller v. Hollander, 61 N. J. Eq. 648, 47 Atl. 646, 88 Am. St. Rep. 456 (citing Pom. Eq. Jur., §§ 190–209).

§ 206. It follows from this fact that the production of documents rests wholly on the defendant's[1] own admissions, contained either in his answer to the bill, or in his answers to interrogatories, or in his affidavit. If his answers or his affidavit are evasive or insufficient, he may be called upon to make them more specific, and to admit or deny; but when he has once directly denied the possession of documents, or their materiality to the plaintiff's case, the court will not compel their production. The truth of the defendant's statements cannot be contested, either by his own cross-examination, or by means of any contradictory evidence offered on the part of the plaintiff.[2] The admission authorizing an order to produce must cover two facts,

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§ 205, [2] By the original chancery practice, an interrogatory or interrogatories, more or less specific according to the plaintiff's choice, are inserted in the bill, asking the defendant whether he has any documents, or such and such particular documents, in his possession. If his answer admits his possession of material documents, an order is made, on the plaintiff's motion, for their production, so that they may be inspected. Under the more recent practice, the defendant's admissions are made in his answer to interrogatories filed, or in his affidavit made in reply to the plaintiff's motion.

§ 206, [1] I say the *defendant's* admission, because it is ordinarily the defendant who is called upon to produce. But the same rule applies alike to the *plaintiff* when the defendant files interrogatories and moves for a disclosure and production by the plaintiff, without a resort to a cross-bill for a discovery, as is permitted by the modern practice in England and in many of the states.

§ 206, [2] Wright v. Pitt, L. R. 3 Ch. 809, 810, per Page Wood, L. J. "The general rule is, that the party seeking discovery of documents must be satisfied with his opponent's affidavit on the subject, and cannot cross-examine or give evidence contradicting it": Reynell v. Sprye, 1 De Gex, M. & G. 656; and see Robbins v. Davis, 1 Blatch. 238. There is, however, one exception to this rule. Notwithstanding the denials of the defendant's affidavit that he has any other documents, if the court has a "reasonable suspicion," arising from *other admissions* of the affidavit or of his answer, that the defendant *must* have other documents in his possession, it may compel him to make a further affidavit containing more specific statements: Saull v. Browne, L. R. 17 Eq. 402; Noel v. Noel, 1 De Gex, J. & S. 468; for the exact limitations of this exception, see Wright v. Pitt, L. R. 3 Ch. 809, 810.

— the possession of the documents and their materiality. Manual possession is not essential. It is enough if the documents are either in the actual possession of the defendant, or are under his control; that is, are in the custody of an attorney, agent, or other third person, whose custody of them the defendant can, by the exercise of his lawful powers, control, or from whom he can, by the exercise of such powers, obtain the possession himself. The rule is the same even when the third person has some lien on the papers.[3] But if the documents belong wholly or in part to a third person not a party to the suit, or if they are in the joint possession of the defendant and of some third person not a party to the suit by virtue of the latter's separate interest or right in them, their production will not be compelled without the consent of such third person.[4]

§ 207. Since the same rules as to materiality, privilege, and the like, which govern discovery, apply to the production of documents, it follows that in order for the plaintiff to be able to compel the production and inspection of the documents admitted to be in the defendant's possession, their materiality to the plaintiff's case must also be admitted by the defendant. If, therefore, the defendant, having admitted certain documents to be in his possession, or having furnished a list of them, definitely denies that they are, or that any portion or provision of them is, material to or relates to the plaintiff's case, he is freed from the obligation of producing them.[1] As has already been explained, the ground upon which the plaintiff's right to the production of documents, as well as to any other discovery, must rest is, that they relate to and are material to his own case, or to the relief which is demanded in his suit; he has no right to a discovery of the defendant's evidence, nor to the production or inspection of papers connected alone with the defendant's title. If, however, the documents *are* material to his own case or to the relief he demands, the fact that they may also be evidence for defense, or may tend to support the defendant's title or contention, does not prevent the plaintiff from compelling their production.[2] [b] In applying this principle to a variety of circumstances, several special rules have been established by the decisions which are found in the foot-note.[3]

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[3] Vale v. Oppert, L. R. 10 Ch. 340, 342;[a] an attorney cannot set up his lien on the documents as against a party's right to their production; and to the same effect is Belaney v. Ffrench, L. R. 8 Ch. 918.[b] As to the production of documents in the custody of third persons, etc., see also Ex parte Shaw, Jacob, 270; Rodick v. Gandell, 10 Beav. 270; Palmer v. Wright, 10 Beav. 234; North v. Huber, 7 Jur., N. S., 767; In re Williams, 7 Jur., N. S., 323; Liddell v. Norton, 23 L. J. Ch. 169; Bethell v. Casson, 1 Hem. & M. 806; Morrice v. Swaby, 2 Beav. 500; Lady Beresford v. Driver, 14 Beav. 387; Robbins v. Davis, 1 Blatch. 238.

[4] Hadley v. McDougal, L. R. 7 Ch. 312; but the nature and extent of such third person's ownership must be explained when this excuse is set up: Bovill v. Cowan, L. R. 5 Ch. 495; as to the non-production of documents partly belonging to third person, or in joint possession of third person, see also Warrick v. Queen's College, Oxford, L. R. 4 Eq. 254; Vyse v. Foster, L. R. 13 Eq. 602; Edmonds v. Foley, 30 Beav. 282; Robertson v. Shewell, 15 Beav. 277; Morrell v. Wootten, 13 Beav. 105; Chant v. Brown, 9 Hare, 790; Ford v. Dolphin, 1 Drew. 222; Penney v. Goode, 1 Drew. 474; Taylor v. Rundell, Craig & P. 104; Murray v. Walter, Craig & P. 114. But the mere fact that third persons are *interested* in the documents is not an excuse for their non-production: Kettlewell v. Barstow, L. R. 7 Ch. 686; Hercy v. Ferrers, 4 Beav. 97; Hopkinson v. Lord Burghley, L. R. 2 Ch. 447.

(a) See also Lewis v. Powell, (1897) 1 Ch. 679.

(b) See also In re Hawkes, (1898) 2 Ch. 1, reviewing the cases.

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[1] But, under the circumstances described, the defendant's statement on oath that he *believes* the documents contain nothing relating to the plaintiff's case, is not enough; he must distinctly and definitely deny the fact; Atty.-Gen. v. Corp'n of London, 2 Macn. & G. 247; as examples of the rule stated in the text, and of its various applications, see Minet v. Morgan, L. R. 8 Ch. 361, per Lord Selborne; Kettlewell v. Barstow, L. R. 7 Ch. 686; Patch v. Ward, L. R. 1 Eq. 436, 439.[a]

[2] See *ante*, §§ 198, 201, 202.

[3] A defendant is not, in general, required to produce his *own* title deeds, which are evidence only of his own title; and therefore, in suits against a mortgagee to redeem, or other suits against him to reach the land, he is not bound to produce the title deeds which have been delivered to him, until the entire mortgage debt, interest and costs, have been paid in full: Chichester v. Marquis of Donegal, L. R. 5 Ch. 497; Minet v. Morgan, L. R. 11

(a) The defendant's denial of the materiality of the documents will not be taken as conclusive if the court can see from the nature of the case or of the documents that the party has misunderstood the effect of the documents: Roberts v. Oppenheim, L. R. 26 Ch. Div. 724.

(b) See also Dock v. Dock, 180 Pa. St. 14, 57 Am. St. Rep. 617, 36 Atl. 411.

§ 208. **IV. When, how Far, and for Whom may the Answer in the Discovery Suit be Used as Evidence.**[a]— If the suit is one for discovery alone without relief, in aid of some action or proceeding in a court of law, and the answer is used as evidence on the trial of such action, its use is entirely governed by the legal rules applicable to such species of testimony. It is, in fact, the admissions of one party to the controversy, proved by his adversary, differing from ordinary admissions only by its more formal and elaborate character. It follows, therefore, that if the party obtaining the discovery reads any portion of the answer in evidence, the whole of it must be read on the demand of the one who made it, so that the jury may be possessed of all his statements and explanation or qualification of his admissions.[1]

Eq. 284; Patch v. Ward, L. R. 1 Eq. 436; Thompson v. Engle, 4 N. J. Eq. 271; Cullison v. Bossom, 1 Md. Ch. 95. This general rule is subject to an exception growing out of the doctrine as to discovery being material to the plaintiff's contention; viz., if a *prima facie* case is made out by the plaintiff impeaching the validity of defendant's title deed on ground of fraud and the like, or that the defendant's deed contains some clause or provision operating in favor of the plaintiff's claim, in such cases a production of the deed will be compelled, for it then becomes evidence material to the *plaintiff's* case: Republic of Costa Rica v. Erlanger, L. R. 19 Eq. 33, 44, 45, per Malins, V. C.; Beckford v. Wildman, 16 Ves. 438; Balch v. Symes, Turn. & R. 87; Bassford v. Blakesley, 6 Beav. 131, 133; Kennedy v. Green, 6 Sim. 6; Latimer v. Neate, 11 Bligh, 112, 4 Clark & F. 470; Follet v. Jefferyes, 1 Sim., N. S., 1; Freeman v. Butler, 33 Beav. 289; Crisp v. Platel, 8 Beav. 62; Cullison v. Bossom, 1 Md. Ch. 195. A mortgagee is, however, always required to produce the *mortgage* itself under which he holds, and suffer it to be inspected by the mortgagor: Patch v. Ward, L. R. 1 Eq. 436, 439. If a defendant is a public officer and has official custody of public documents, he will not be required to produce them by way of answer: Salmon v. Claggett, 3 Bland, 145. It was held in Boyd v. Petrie, L. R. 3 Ch. 818, that an application by either party before trial, to have a specified document in the hands of his adversary produced and submitted to the inspection of intended witnesses of the party applying, so that they may be able to testify concerning it at the trial, is a very special application, and must be supported by an affidavit of very special circumstances showing the necessity of such a course.

[1] Fant v. Miller, 17 Gratt. 187; Hart v. Freeman, 42 Ala. 567. Where the American courts have assumed the jurisdiction to go on and give final

(a) Cited in District of Columbia v. Robinson, 180 U. S. 92, 21 Sup. Ct. 283, to the effect that the answers to the bill of discovery are not conclusive against the other party at law.

Very different and special rules have been established as to the effect and use of the defendant's answer for purposes of evidence, both on behalf of the complainant and of himself, in equity suits for relief as well as for a discovery. As the answer in ordinary equity suits may always consist of two parts,— that which is purely matter of pleading, consisting of denials of the plaintiff's allegations, and affirmative averments of the defendant's case; and that which is strictly matter of evidence, consisting of answers to the interrogatories contained in the plaintiff's bill,— it is plain that this subject belongs wholly to the system of procedure, the pleading and the evidence, prevailing in courts of equity, and is not embraced within the scope of the present treatise.[2]

§ 209. **Modern Statutory Methods.**— In the foregoing paragraphs I have collected the rules which have been settled by courts possessing the equitable jurisdiction, and acting in conformity with the principles and methods of the chancery system of procedure, both concerning the use of "suits for discovery" alone, or properly so called, and concerning the subject-matter of the discovery of facts, and of the production of documents, whether such discovery and production are obtained in "suits for discovery" proper, or in ordinary equitable suits for relief as well as

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relief on the ground of the application to them for discovery, although the relief is legal in its nature, and could be adequately obtained at law, the same rule as to using the answer in evidence has been applied: Shotwell v. Smith, 20 N. J. Eq. 79; Holmes v. Holmes, 36 Vt. 525; Lyons v. Miller, 6 Gratt. 439, 52 Am. Dec. 129.

[2] See, on this subject, Adams's Eq. 20–22; Bartlett v. Gillard, 3 Russ. 149, 156; Freeman v. Tatham, 5 Hare, 329; East v. East, 5 Hare, 343; East India Co. v. Donald, 9 Ves. 275; Savage v. Brocksopp, 18 Ves. 335; McMahon v. Burchell, 2 Phill. Ch. 127; Glenn v. Randall, 2 Md. Ch. 220; Fant v. Miller, 17 Gratt. 187; Swift v. Dean, 6 Johns. 523; Clason v. Morris, 10 Johns. 524; Stafford v. Bryan, 1 Paige, 239; Page v. Page, 8 N. H. 187; Daniel v. Mitchell, 1 Story, 173; Hughes v. Blake, 6 Wheat. 453; Union Bank v. Geary, 5 Pet. 99; Chance v. Teeple, 4 N. J. Eq. 173; Myers v. Kinzie, 26 Ill. 36; White v. Hampton, 10 Iowa, 238; Hart v. Freeman, 42 Ala. 567; Eaton's Appeal, 66 Pa. St. 483; as to the effect of the plaintiff's waiver of an answer under oath: Sweet v. Parker, 22 N. J. Eq. 453; Tomlinson v. Lindley, 2 Ind. 569.

discovery. It has also been shown that the same doctrines in relation to the subject-matter of the discovery and the production of documents are still in force under the procedure now prevailing in England and in some of our states, which has abolished the old modes of discovery, either by separate suit or by the defendant's answer in suits for relief, and has substituted in its place the use of interrogatories filed in the progress of a suit, by which either party may probe the conscience of his adversary, and obtain evidence from him as an ordinary proceeding in the litigation.[1] In many of the states, however, where a discovery, as an ordinary step in the cause, is not provided for otherwise than by the oral examination of the opposite party as a witness at the trial itself, there are statutes which authorize and regulate certain special applications to the court by motion or petition for a preliminary examination of the opposite party, in order to obtain facts necessary to the proper framing of the cause of action or defense in the applicant's pleading, or to compel the preliminary production and inspection of books and documents, or to accomplish some other similar special purpose. As these collateral proceedings are wholly regulated by the statutes which create them, their discussion belongs to books professedly treating of practice, and does not come within the scope of the present work, except so far as the matters of which a discovery may be compelled, and those which are privileged from disclosure, are embraced within the doctrines hereinbefore explained. I have, however, placed in the foot-note some of the more important decisions interpreting these statutory provisions.[2] [a]

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[1] It is very remarkable that this simple, direct, and efficacious mode of obtaining evidence to be used on the trial has not been adopted *as an ordinary proceeding in the progress of a litigation* in all the states where the reformed system of procedure prevails.

[2] The following are some of the most important and recent decisions, which

(a) In Ex parte Boyd, 105 U. S. 647, it was held that the statutes of New York authorizing the examination of a debtor upon proceedings supplemental to execution was not a mere statutory interference with

EXAMINATION OF WITNESSES.

§ 210. **This Jurisdiction Described.**— While the first branch of the auxiliary jurisdiction deals with the matter of obtaining evidence from the parties themselves, the second branch comprises the methods of examining witnesses who are not parties, and of preserving their evidence for future use at the trial of actions at law, or at the hearing of suits in equity. This branch of the auxiliary jurisdiction was doubtless established in aid of proceedings at law, although its methods may also be used in suits strictly equitable. Where a right now exists, which is likely to be disputed or contested at some future time, but no action can yet be brought for the purpose of establishing it, and there is danger that all the witnesses will have died, and the evidence by which alone it can be supported will have disappeared before that time arrives at which an action can be brought, the common law furnished no means for taking

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will put the reader upon the track of other and earlier authorities. It will be seen that upon all matters affecting the merits, what disclosures may be compelled, materiality, privilege, etc., the courts uniformly hold that these statutory proceedings take the place of the equity suit for a discovery, and are governed by substantially the same rules. 1. *Proceeding for the examination of the opposite party:* Glenny v. Stedwell, 51 How. Pr. 321. (The plaintiff in a pending action may examine the adverse party before service of the complaint, and for the purpose of obtaining facts on which to frame a complaint. The proceeding is intended to take the place of the equity suit for a discovery, and may be used whenever and for whatever purpose a discovery could be made.) Plaintiff may examine the opposite party before issue is joined: Hadley v. Fowler, 12 Abb. Pr., N. S., 244; Havemeyer v. Ingersoll, 12 Abb. Pr., N. S., 301; McVickar v. Greenleaf, 1 Abb. Pr., N. S., 452, 7 Rob. (N. Y.) 657, overruling Bell v. Richmond, 4 Abb. Pr., N. S., 44, 50 Barb. 571; as to what defendant may be compelled to answer, see Dambman v. Butterfield, 4 Thomp. & C. 542; as to disclosure tending to render defendant liable for penalties, etc., see United States v. Hughes, 12 Blatch. 553.

the equitable remedies for a discovery, and that consequently they were available in the federal courts, by virtue of section 916 of the Revised Statutes which provides that "the party recovering judgment in any common-law cause in any circuit or district court shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the state."

the testimony of the witnesses in anticipation. To prevent such a failure of justice, the auxiliary jurisdiction of equity contrived the suit for perpetuating the testimony of witnesses under such circumstances. Again, where a suit at law has actually been commenced, but has not reached the time for trial, and there is danger lest the evidence of certain material witnesses should be lost, from their extreme age, or from their being sick, or from their being about to leave the country, and also where in such a suit material witnesses are actually in a foreign country, so that their attendance cannot be compelled, nor their testimony taken upon deposition by any modes which the common law had furnished, the auxiliary jurisdiction supplied the defect by means of a suit to take the testimony of the witnesses *de bene esse* in the one case, and a suit to take the testimony of the witnesses in foreign countries upon a commission issued out of chancery in the other case.[1] As these three

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2. *Compelling production and inspection of documents:* Merchants' Nat. Bank v. State Nat. Bank, 3 Cliff. 201; United States v. Hughes, 12 Blatch. 553; Livingston v. Curtis, 12 Hun, 121, 54 How. Pr. 370, overruling Platt v. Platt, 11 Abb. Pr., N. S., 110; Cutter v. Pool, 54 How. Pr. 311; New England Iron Co. v. New York Loan, etc., Co., 55 How. Pr. 351; Mott v. Consumers' Ice Co., 2 Abb. N. C. 143, 52 How. Pr. 148, 244; Morgan v. Morgan, 16 Abb. Pr., N. S., 291; Central Nat. Bank v. White, 37 N. Y. Super. Ct. 297; Whitworth v. Erie R. R., 37 N. Y. Super. Ct. 437; Holtz v. Schmidt, 34 N. Y. Super. Ct. 28; Rice v. Ehele, 55 N. Y. 518; Thompson v. Erie R. R., 9 Abb. Pr., N. S., 212, No. 2, 9 Abb. Pr., N. S., 230; Williams Mower, etc., Co. v. Raynor, 38 Wis. 132; Noonan v. Orton, 28 Wis. 386; Whitman v. Weller, 39 Ind. 515; O'Connor v. Tack, 2 Brewst. 407 (a full and instructive case); Esbach v. Lightner, 31 Md. 528. 3. *What facts, etc., must be shown in the application; what the order must contain:* Cutter v. Pool, 54 How. Pr. 311; New England Iron Co. v. New York Loan, etc., Co., 55 How. Pr. 351; Mott v. Consumers' Ice Co., 52 How. Pr. 148; Central Crosstown R. R. v. Twenty-third St. R. R., 53 How. Pr. 45; Central Nat. Bank v. White, 37 N. Y. Super. Ct. 297; Whitworth v. Erie R. R., 37 N. Y. Super. Ct. 437; Holtz v. Schmidt, 34 N. Y. Super. Ct. 28; Rice v. Ehele, 55 N. Y. 518; Hauseman v. Sterling, 61 Barb. 347; Phelps v. Platt, 54 Barb. 557; Thompson v. Erie R. R., 9 Abb. Pr., N. S., 212, 230; Williams Mower, etc., Co. v. Raynor, 38 Wis. 132; Whitman v. Weller, 39 Ind. 515; O'Connor v. Tack, 2 Brewst. 407; Esbach v. Lightner, 31 Md. 528. 4. *Other points of practice:* Noonan v. Orton, 28 Wis. 386; Whitman v. Weller, 39 Ind. 515.

[1] Jeremy's Eq. Jur., b. 2, chap. 2, pp. 270–280.

equitable proceedings were very cumbrous, and as they have been practically superseded, even if not expressly abolished, both in England and in most of the states, by more simple, direct, and efficacious statutory methods, a very brief description of them will suffice.

§ 211. **I. Suit to Perpetuate Testimony.**[a]— A suit to perpetuate testimony could only be maintained where the plaintiff had at the time some right vested or contingent, to which the testimony would relate; but such right could not *then* be investigated, established, or defended by an action at law. As the foundation of the suit, the plaintiff in it, not yet being in possession of the property in question, might have a future interest, to take effect only upon the happening of some future and perhaps contingent event; or he might have an immediate present interest, being in possession of the property, and his possession not yet actually disturbed, but threatened with disturbance or contest, by the defendant, at some future time; in either of which cases he could immediately bring no action at law to maintain or defend his right.[1] As to the nature of the plaintiff's interest, it might be in real or in personal property, or in mere personal demands, and might be such that the testimony sought would be used in support of a cause of action or of a defense at law.[2] But as the law stood independent of statute, the plaintiff must have an *interest* recognized and maintainable by the law, although it might be very small, remote, and contingent.[3] Therefore if the plaintiff has only a possibility or an expectancy, no matter how probable and actually valuable, he could not maintain the suit; as in case of an heir at law during the life of his ancestor.[4] In England the right of the plaintiff to maintain the proceeding with respect to the nature of his interest has been enlarged by statute; which embraces those who have mere possibilities, as well as those who have actual interests.[5] If the right, interest, or claim could possibly be made the subject of an immediate judicial investigation in an action brought by the party who commences a suit to perpetuate testimony, such suit would for that reason be dismissed; but if the party cannot possibly bring the matter before a court so that his right or claim may be adjudicated upon at once, the equity suit to perpetuate the testimony can be maintained. The reason given by the cases is, that the only evidence in support of the plaintiff's rights might

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[1] Jeremy's Eq. Jur. 277; Dursley v. Fitzhardinge, 6 Ves. 251; Angell v. Angell, 1 Sim. & St. 83. Mr. Justice Story, in his treatise on Equity Jurisprudence, section 1513, in comparing "bills to take testimony *de bene esse*" with "bills to perpetuate testimony," uses the following language: "There is this broad distinction between bills of this sort [to examine *de bene esse*] and bills to perpetuate testimony, that the latter are and can be brought by persons *only* who are *in possession* under their title, and who cannot sue at law. But bills to take testimony *de bene esse* may be brought, not only by persons in possession, but by persons who are out of possession, in aid of the trial at law"; citing, among others, Jeremy's Eq. Jur. 277, 278. This statement of the learned commentator, restricting bills to perpetuate testimony to persons who *are in possession* under their title, is a grave error, and is in direct variance with the authorities cited in its support, and with the general doctrine as laid down by text-writers and courts. Mr. Jeremy, at the page cited (p. 277), says: "From these observations it will appear that the proceedings for the examination of witnesses *de bene esse,* and in perpetuation of testimony, are very distinct. The court, it will be seen, gives aid of the former kind, . . . and of the *latter* kind where the party applying for it is *in possession,* but anticipates an aggression upon his enjoyment at a future time when his adversary shall have gained sufficient advan-

(a) Cited with approval in Winter v. Elmore, 88 Ala. 555, 7 South. 250.

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tage by delay, *or is out of possession*, and has, at present, no right of action, but designs himself, when such a right shall accrue, to commence proceedings at law." See also, to the same effect, Adams's Eq. 23.

[2] Earl of Suffolk v. Green, 1 Atk. 450.

[3] Dursley v. Fitzhardinge, 6 Ves. 251; Allan v. Allan, 15 Ves. 134–136; Earl of Belfast v. Chichester, 2 Jacob & W. 451, 452; Townshend's Peerage Cases, 10 Clark & F. 289.

[4] Even though the ancestor was a lunatic. See cases in last note; also Sackvill v. Aylesworth, 1 Vern. 105, 106. And see In re Tayleur, L. R. 6 Ch. 416.

[5] Stat. 5 & 6 Vict., chap. 69, which enacts that "any person who would, under the circumstances alleged by him to exist, become entitled, upon the happening of any future event, to any honor, title, dignity, or office, or to any interest or estate in any property, real or personal, the right or claim to which cannot by him be brought to trial before the happening of such event, shall be entitled to file a bill to perpetuate any testimony which may be material for establishing such claim or right." See Campbell v. Earl of Dalhousie, L. R. 1 H. L. S. 462.

be lost by the death of his witnesses; and the adverse party might delay to move in the matter for the very purpose of obtaining the advantage resulting from such an event.[6][a] The mode of examining the witnesses is by deposition similar to that pursued in other equity suits. The cause does not proceed any further than the examination of the witnesses; the suit is then really at an end. The only further step is the "publication of the evidence," as it is called in the chancery practice, by which the parties have access to and become entitled to use the testimony. This "publication" is made by an order of the court; but such an order cannot be obtained except for the purpose of using the testimony in some action, nor can it be obtained, as a general rule, even for that purpose until after the death of the witnesses whose depositions are sought to be used. This latter rule can only be evaded on very special grounds, by showing that although the witnesses are still living their examination in the action is morally impossible.[7]

§ 212. **Statutory Modes.**— As this particular instance of the auxiliary jurisdiction of equity is wholly based upon the mode of taking the testimony of witnesses by written depositions, which prevailed in the original chancery practice, it would seem to follow as a necessary result that the equitable *suit* to perpetuate testimony has been abrogated in all those American states where the reformed procedure has been adopted by which the method of taking testimony of witnesses in the form of written depositions, as well in equitable suits as in legal actions, is abolished. This manner of obtaining the evidence being no longer the characteristic of any class of suits in those states, the ancient exercise of the auxiliary jurisdiction for preserving evidence by a *suit* would seem to be impossible. In the other states, also, which have not adopted the reformed procedure, the special statutory proceedings for the perpetuation of testimony have virtually displaced and rendered obsolete the equitable suit for that purpose.[a]

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[6] Angell v. Angell, 1 Sim. & St. 83; Ellice v. Roupell, 32 Beav. 299; Earl Spencer v. Peek, L. R. 3 Eq. 415.

[7] Angell v. Angell, 1 Sim. & St. 83; Morrison v. Arnold, 19 Ves. 670; Barnsdale v. Lowe, 2 Russ. & M. 142. As to the practice, see further, Att'y-Gen. v. Ray, 2 Hare, 518; Beavan v. Carpenter, 11 Sim. 22; Wright v. Tatham, 2 Sim. 459. It has been held that the testimony thus perpetuated may be used in the court of a foreign country: Morris v. Morris, 2 Phill. Ch. 205.

(a) See also West v. Lord Sackville, (1903) 2 Ch. 378.

§ 213. **II. Suits to Take the Testimony of Witnesses de Bene Esse, and of Witnesses in a Foreign Country.**[a]— A suit to take testimony *de bene esse* is maintained in aid of a pending action at law to examine a witness who is very aged, or who is sick, or who is about to depart from the country, or a person who is the *only* witness to a material fact in the cause, although neither aged nor sick; the ground of such proceeding being the evident danger lest the evidence should be entirely lost to the party by a delay.[1] There is a very clear line of distinction between this suit and that to perpetuate testimony. While the latter could only be brought by a party who had no present immediate cause of action, this suit to take testimony *de bene esse* can only be maintained by one who has an existing cause of action or defense, and while the action of law is pending.[2] After the depositions are completely taken, they cannot be read as evidence at the trial, unless it is shown that the witness is dead, or is beyond the jurisdiction, or is too physically infirm, or is otherwise incapable of attending to testify in person.[8]

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[1] Jeremy's Eq. Jur. 271–273; Angell v. Angell, 1 Sim. & St. 83, 92, 93; Fitzhugh v. Lee, Amb. 65; Rowe v. ———, 13 Ves. 261; Cholmondelay v. Orford, 4 Brown Ch. 157; Shirley v. Earl Ferrers, 3 P. Wms. 77; Pearson v. Ward, 1 Cox, 177; Prichard v. Gee, 5 Madd. 364. Such an examination may also be had, under like circumstances, in a pending equity suit, before it is at issue, so that the examination can take place in the ordinary manner. See Frere v. Green, 19 Ves. 320; Cann v. Cann, 1 P. Wms. 567; Hope v. Hope, 3 Beav. 317; McIntosh v. Great West R'y, 1 Hare, 328.

[2] Angell v. Angell, 1 Sim. & St. 83; but Phillips v. Carew, 1 P. Wms. 117, holds that the action at law need not yet be begun; that it may be only contemplated. This ruling was sharply criticised and condemned by Sir John Leach, in Angell v. Angell, 1 Sim. & St. 83, and its authority shaken.

§ 212, (a) In Winter v. Elmore, 88 Ala. 555, 7 South. 250, it is held that the statutory proceedings which take the place of suits to perpetuate testimony, and to take testimony *de bene esse*, are intended, like them, to reach the testimony of witnesses only, and not of parties.

§ 213, (a) Cited with approval in Winter v. Elmore, 88 Ala. 555, 7 South. 250.

§ 214. The suit to examine witnesses in a foreign country upon a commission issued for that purpose, in aid of a pending action at law, is founded upon the original lack of any power in the common-law courts to grant such commissions. The name indicates the nature and extent of the proceeding. It is in fact a branch or modification of the suit to take testimony *de bene esse,* and is governed by the rules applicable to that suit, except the witnesses in foreign countries to be examined need not be aged nor sick. The inability to reach them, or to compel their personal attendance by any legal process, is the ground upon which the jurisdiction rests.[1]

§ 215. **Statutory Modes.**— Both of these modes of taking testimony through an equitable suit have become entirely obsolete throughout the United States. Ample powers were long ago conferred by statute upon the various courts of law, to permit and direct the testimony of aged, or infirm, or other witnesses to be taken preliminary to the trial in any pending proceeding, under all the circumstances which would have authorized a suit to take the testimony *de bene esse,* and also to permit and direct the issuing of commissions to other states and to foreign countries, for the purpose of taking the testimony of absent witnesses, under like circumstances. These statutory methods, being more simple, speedy, and efficacious, have wholly superseded this branch of the auxiliary jurisdiction of equity.

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[8] Harris v. Cotterell, 3 Mer. 680; Gason v. Wordsworth, 2 Ves. Sr. 336; Dew v. Clark, 1 Sim. & St. 108; Webster v. Pawson, Dick. 540.

[1] Grinnell v. Cobbold, 4 Sim. 546; Moodalay v. Morton, 1 Brown Ch. 469; Angell v. Angell, 1 Sim. & St. 83, 93; Mendizabel v. Machado, 2 Sim. & St. 483; Thorpe v. Macauley, 5 Madd. 218, 231; Devis v. Turnbull. 6 Madd. 232.

CHAPTER SECOND.

GENERAL RULES FOR THE GOVERNMENT OF THE JURISDICTION.

SECTION I.

INADEQUACY OF LEGAL REMEDIES.

ANALYSIS.

§ 216. Questions to be examined stated.
§ 217. Inadequacy of legal remedies is the very foundation of the concurrent jurisdiction.
§ 218. Is only the occasion for the rightful exercise of the exclusive jurisdiction.
§ 219. Operation of the principle upon the exclusive jurisdiction; does not affect the first branch, which deals with equitable estates and interests.
§§ 220, 221. Is confined to the second branch, which deals with equitable remedies.
§ 222. Summary of the equity jurisdiction as affected by the inadequacy of remedies.

§ 216. **Questions Stated.**—Having thus described the three main divisions into which the equitable jurisdiction of courts clothed with chancery powers is separated, it becomes important to examine with more fullness some of the general rules which govern this jurisdiction, and the courts in its exercise. It is especially important that we should determine with exactness the true operation and effect of the principle, so constantly quoted, and even embodied in statutory legislation, that the equitable jurisdiction can only be resorted to when the legal remedies are insufficient and inadequate.[a] How far and under what circumstances is this principle the foundation of the equitable jurisdiction, the essential fact upon which its very existence

[a] See also *ante*, §§ 132, 133.

depends? and how far is it simply a rule — although a fundamental rule — regulating and controlling the proper exercise of that jurisdiction? I purpose, in the first place, to give the answer to these questions.

§ 217. **Inadequacy of Legal Remedies the Foundation of the Concurrent Jurisdiction.**— The insufficiency and inadequacy of the legal remedies to meet the requirements of justice under any given state of circumstances, where the primary rights, interests, or estates of the litigant parties to be enforced or maintained are wholly legal, constitute the foundation of the *concurrent* jurisdiction of equity to interfere under those circumstances, they are the essential facts upon which the existence of that jurisdiction depends. Since the primary rights, interests, or estates of the litigant parties are legal, those parties are, of course, entitled to go into a court of law and obtain the remedies which it can furnish. But it is solely because these legal remedies are, under the assumed circumstances, inadequate to do complete justice, by reason of the imperfection of the judicial methods adopted by the law courts, that the courts of equity have also the power to interfere and to award, in pursuance of their own judicial methods, remedies which are of the same general kind as those granted by the courts of law to the same litigant parties under the same circumstances. This is the essential element of the concurrent jurisdiction; its very existence thus depends upon the inadequacy of the legal remedies given to the litigant parties, under the same circumstances upon which the equity tribunal bases its adjudication. This proposition has been sufficiently explained in the preceding sections.[a]

§ 218. **Is the Occasion only of the Exclusive Jurisdiction.**— There is, however, a radical difference between the *operation* of this inadequacy of legal remedies upon the concurrent equitable jurisdiction and upon the exclusive jurisdiction, although the direct results of the operation in both

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(a) See §§ 139, 173, 176, 180.

cases may be apparently the same; and it is the neglect to observe this distinction which has tended more than anything else to involve the whole subject in confusion. The exclusive equitable jurisdiction, or the power of the courts to adjudicate upon the subject-matters coming within that jurisdiction, *exists* independently of the adequacy or inadequacy of the legal remedies obtainable under the circumstances of any particular case. It exists, as has been shown in a preceding section, from one or the other of two facts: either, *first,* because the primary rights, interests, or estates of the complaining party, which are to be enforced or protected, are equitable in their nature, and are therefore not recognized by the law so as to be cognizable in the law court; or *second,* because the remedies asked by the complaining party are such as are administered alone by courts of equity, and are therefore beyond the competency of the courts of law to grant. Whenever either of these two facts is involved in the circumstances of a judicial controversy, the jurisdiction of equity over the subject-matter of such controversy is, and from the nature of the case must be, *exclusive.* But because the equitable jurisdiction in certain kinds of circumstances is exclusive, it does not follow that the jurisdiction can be *properly exercised* in every individual case involving or depending upon such circumstances. The power of a tribunal to adjudicate upon a class of facts to which a certain individual case belongs is not identical with the due and proper *exercise* of that power, according to the established rules of jurisprudence, by a judgment maintaining the alleged right and conferring the demanded remedy. This proposition is self-evident, is a mere commonplace truism; and yet it has been ignored in much that has been said concerning the equitable jurisdiction. The distinction thus stated clearly shows the manner in which the inadequacy of legal remedies under a given condition of circumstances operates upon and affects the *exclusive* equitable jurisdiction. Such inadequacy simply furnishes the *occasion* upon which much of the exclusive jurisdiction may properly be resorted to; it is the rule, in many instances, for the proper use of the exclusive jurisdiction in accordance with the settled doctrines of equity jurisprudence; that jurisdiction can only be duly and regularly exercised, in many instances, by an affirmative adjudication upon the alleged rights and an award of equitable remedies, when the legal remedies obtainable under the same facts are inadequate to promote the ends of justice.[1] [a]

§ 219. **Operation of the Principle upon the Exclusive Jurisdiction.**— The foregoing statement is so general and vague as to be of little practical benefit; it is necessary, therefore, to define the principle more exactly, and to ascertain, if possible, what portions of the exclusive jurisdiction thus depend for their due and proper exercise upon the inadequacy of legal remedies and the insufficiency of legal methods. The exclusive jurisdiction consists, as has been shown, of two distinct branches, namely: 1. Where the primary rights, interests, or estates of the complaining parties are wholly equitable; and 2. Where the primary rights, interests, or estates are legal, but the remedies sought and obtained are wholly equitable. The principle that the inadequacy of legal remedies furnishes the occasion for a resort to the equitable jurisdiction and the rule for its proper exercise does not extend to the first branch or division of the exclusive jurisdiction. The exercise of the power, in cases belonging to this first branch, to adjudicate upon, maintain, enforce, or protect purely equitable primary rights, interests, or estates does not at all depend upon any insufficiency or inadequacy of legal methods and remedies, but solely upon the fact that these primary rights, interests, or estates are wholly equitable, are not recognized by the law nor cognizable by the courts of law, and there is therefore no other mode of maintaining and enforcing them except by the courts of equity. Wherever the complaining party has purely equitable primary rights, interests, or estates according to the doctrines and principles of the equity jurisprudence, courts having equitable powers do and must exercise their exclusive jurisdiction over the case, entirely irrespective of the adequacy or inadequacy of legal remedies, for the plain and sufficient reason that the litigant party cannot possibly obtain any legal remedies under the circumstances; the courts of law do not recognize his rights, and cannot adjudicate upon nor protect his interests and estates. One or two examples will illustrate the correctness and the generality of this statement. In the case of a trust created in lands, the estate of the *cestui que trust* is purely an equitable one, of which law courts refuse to take cognizance. He is therefore always entitled to the aid of a court of equity in establishing, maintaining, and enforcing his estate according to the nature of the trust and the doctrines of equity jurisprudence which regulate it, and to obtain such remedies as the circumstances may require; and the question never is asked, nor could be asked, whether the remedies given him by a court of law are or are not adequate, since all legal remedies are to him impossible.[1] Again, in case of an equitable assignment,— as, for example, the equitable assignment of a particular fund or a portion thereof by means of an unaccepted order on the depositary,— the interest of the assignee in the fund is a purely equitable ownership, and he is always entitled to maintain an action in a court of equity, although the actual relief which he obtains is legal in its nature, being simply a recovery of money. The proper exercise of the equitable jurisdiction under such circumstances cannot depend upon any inadequacy of legal remedies, since a court of law would not acknowledge any right or interest of the assignee.[2] A well-settled doctrine concerning the interference with actions at law by injunction furnishes a further illustration. If the defendant in an action at law has an equitable interest or estate in the property, or an equitable right in the subject-matter, which, according to the established rules of equity jurisprudence, should prevent a recovery against him, but which, being purely equitable, cannot be set up as a defense in the proceeding before a court of law, he can invoke the exclusive jurisdiction of a court of equity, without regard to any legal defenses which he may have, and can procure the action at law to be restrained, and his own equitable interest to be established and enforced by means of appropriate equitable reliefs, because such equitable interest is not recognized by the law nor cognizable by the legal tribunals.[3] Such illustrations might be indefinitely multiplied. They are, however, sufficient to show that, so far as the exclusive jurisdiction of equity is concerned with equitable estates, interests, and primary rights alone of the complaining party, and therefore belongs to the first branch, its exercise does not depend upon any consideration of the adequacy or inadequacy of legal remedies, but depends upon and is controlled by the doctrines and rules of the equity jurisprudence. Such jurisdiction both exists and is exercised because the equitable estates, interests, or rights of the litigant party exist, and can be established, protected, and enforced by no other judicial means and instrumentalities.

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[1] Earl of Oxford's Case, 1 Ch. Rep. 1, 2 Lead. Cas. Eq. 1291; Southampton Dock Co. v. Southampton, etc., Board, L. R. 11 Eq. 254; Rathbone v. Warren, 10 Johns. 587; King v. Baldwin, 2 Johns. Ch. 554.

(a) See also *ante*, §§ 137, 138, 139, note, 173.

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[1] It will be understood, of course, that I am speaking of the equity jurisdiction, unaffected by any particular statutes. There may be legislation in the various states similar to the statute of Georgia already referred to [§ 137, note], which permits the holder of a "complete equity" in land, e. g., the vendee under a land contract who has paid the purchase price, to maintain the legal action of ejectment, in order to recover possession of the land.

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[2] Rodick v. Gandell, 1 De Gex, M. & G. 763; Ex parte Imbert, 1 De Gex & J. 152; Mandeville v. Welch, 5 Wheat. 277, 286; Gibson v. Finley, 4 Md. Ch. 75; Wheatley v. Strobe, 12 Cal. 92, 98, 73 Am. Dec. 522; Shaver v. West. U. T. Co., 57 N. Y. 459, 464; and see cases cited *ante*, under § 169.

[3] Earl of Oxford's Case, 1 Ch. Rep. 1, 2 Lead. Cas. Eq. 1291; Pyke v. Northwood, 1 Beav. 152; Newlands v. Paynter, 4 Mylne & C. 408; Langton v. Horton, 3 Beav. 464, 1 Hare, 549; East India Co. v. Vincent, 2 Atk. 83; Stiles v. Cowper, 3 Atk. 692; Jackson v. Cator, 5 Ves. 688; Pilling v. Armitage, 12 Ves. 85; Young v. Reynolds, 4 Md. 375; Ross v. Harper, 99 Mass. 175; Fanning v. Dunham, 5 Johns. Ch. 122, 9 Am. Dec. 283; Edwards v. Varick, 1 Hoff. Ch. 382, 11 Paige, 290, 5 Denio, 664, 679; Hibbard v. Eastman, 47 N. H. 507, 93 Am. Dec. 467; Miller v. Gaskins, 1 Smedes & M. Ch. 524; Smith v. Walker, 8 Smedes & M. 131; Wilson v. Leigh, 4 Ired. Eq. 97; Rees v. Berrington, 2 Ves. 540; Williams v. Price, 1 Sim. & St. 581; Capel v. Butler, 2 Sim. & St. 457; Hayes v. Ward, 4 Johns. Ch. 123, 8 Am. Dec. 554; Viele v. Hoag, 24 Vt. 46; Gallagher v. Roberts, 1 Wash. C. C. 156, 328; Boardman v. Florez, 37 Mo. 559.

§ 220. It is otherwise with the second branch of the exclusive jurisdiction, as above described, where the primary rights, interests, or estates of the complaining party are legal in their nature, but the remedies sought by him are entirely equitable. Where a person has a legal primary right, he is not always, and as a matter of course, entitled to go into a court of equity, set its jurisdiction in motion, and obtain the equitable remedies appropriate to maintain or protect his right. Since his estates, interests, or primary rights are legal, he can always, in case of their infringement or violation, demand and recover the legal remedies which are conferred by courts of law under the circumstances. Whether he may also demand and recover the proper equitable remedies depends upon other considerations. Although the jurisdiction of courts of equity to grant these equitable remedies in all such cases is *exclusive,* because courts of law (except as authorized by modern statutes) have no power to grant them, yet the courts of equity will not, in every instance, exercise their jurisdiction. The proper exercise of the jurisdiction in every case of this kind — but not the jurisdiction itself — depends upon the question whether the legal remedies which the party can obtain from courts of law upon the same facts and circumstances are inadequate to meet the ends of justice,— insufficient to confer upon him all the relief to which he is justly entitled. If the legal remedies administered by the judicial machinery and methods adopted in the law courts *are* fully adequate to establish, protect, and enforce the party's legal estates, interests, and rights, a court of equity will not interfere in his behalf with the purely remedial branch of its exclusive jurisdiction; if the legal remedies, either from their own essential nature or from the imperfection of the legal procedure, are inadequate, then a court of equity will interpose, and do complete justice by granting the appropriate equitable remedies which it alone is competent to confer. Examples taken from the decided cases in which the various kinds of equitable remedies have been decreed would clearly show that the *dicta* of judges and the rules laid down by courts concerning the general dependence of the equitable jurisdiction upon the inadequacy of legal remedies, however conflicting they may *appear* to be, are all embraced within and rendered harmonious and consistent by the foregoing principle; they all become particular applications and illustrations of this principle.[1] A few such instances must suffice for explanation.

§ 221. The well-settled rules concerning the restraint of actions at law by means of injunction furnish a great variety of examples. When the defendant in an action at law has some equitable interest or right which, being established according to the doctrines of equity jurisprudence, would prevent the recovery at law against him, then a court of equity will, as a matter of course, take cognizance of the matter, entertain a suit on his behalf, and enjoin the action at law, in order that it may, by the proper equitable remedies, maintain, protect, or enforce the equitable right held by such party.[1] But, on the other hand, when the right or interest on which the defendant in the action at law relies is legal in its nature, so that it may be set up by way of defense in such action, and may be adjudicated upon by the court of law, and the defendant is prevented or hindered from thus presenting or availing himself of his legal defense by means of some collateral or extrinsic matter, such as fraud, duress, mistake, ignorance, negligence, and the like, or the defense itself, although legal, involves some matter of equitable cognizance, such as fraud, mistake, or accident,— whether a court of equity will then interpose in aid of the party, will take cognizance of the controversy, and enjoin the action at law, in order that the legal right of the defendant therein may be rendered effective so as to prevent a recovery against him, always depends upon the question whether the legal remedies which the litigant party, under the circumstances of the case, has obtained from the court of law, or might have obtained by the use of due diligence, are inadequate to attain the ends of justice; in other words, whether the refusal of a court of equity to interpose would, from the insufficiency of the legal relief, or the imperfection of the legal procedure, work a substantial injustice to the litigant party under all the facts of this case.[2] In both these classes of cases the equitable jurisdiction is exclusive, since a court of equity alone has power to grant the remedy of injunction; in the first, the jurisdiction is always exercised as a matter of right, in the second, its exercise is supplementary to the judicial methods existing at the law, and is called into operation only when those methods fail to give complete relief.[3] Additional examples may be found in the established rules concerning the use of the injunction. The jurisdiction to restrain torts to property, real or personal, nuisances, trespasses, and the like, by injunction, is exclusive, although the estate of the complaining party which is interfered with, and which he seeks to protect, is legal, and he is entitled to the legal remedy of compensatory damages, yet the preventive remedy which he demands for the protection of his property is wholly equitable, and can only be administered by courts of equity. The general doctrine is well established that this exclusive jurisdiction will not be exercised in any case for the purpose of enjoining trespasses and other tortious acts to property, at the suit of one having the legal estate, unless the legal remedy — compensatory damages — is inadequate, under the circumstance of the case, to confer complete relief upon the injured party.[4]

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[1] I do not mean that in their *dicta* and statements of rules concerning the equitable jurisdiction, the judges have always consciously recognized this principle, and have expressly drawn the distinction formulated in the text, viz., that while the inadequacy of legal remedies is the fact upon which the *concurrent* jurisdiction *exists*, it simply furnishes the occasion and rule for the *exercise* of the exclusive jurisdiction, and furthermore, that the application of this latter doctrine, by which the actual exercise of the exclusive jurisdiction is made to depend upon the inadequacy of legal remedies, is confined to one branch alone of that jurisdiction, the branch which is concerned with the granting of purely equitable remedies in cases where the primary rights of the complaining party are legal, and does not extend to the other branch, which deals with cases where the primary rights of the party are wholly equitable. But I claim that the principle formulated and distinctions thus stated in the text are implicitly and necessarily contained in and established by the judicial *dicta* and rules, and produce an orderly and consistent system out of materials which, on the surface, appear to be unarranged and conflicting.

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[1] See *ante*, § 219.

[2] Earl of Oxford's Case, 1 Ch. Rep. 1, 2 Lead. Cas. Eq. 1291; Harrison v. Nettleship, 2 Mylne & K. 423; Hardinge v. Webster, 1 Drew. & S. 101; Simpson v. Lord Howden, 3 Mylne & C. 108, per Lord Cottenham; Curtess v. Smalridge, 1 Eq. Cas. Abr. 377, pl. 1; Stephenson v. Wilson, 2 Vern. 325; Blackhall v. Combs, 2 P. Wms. 70; Protheroe v. Forman, 2 Swanst. 227, 233; Holworthy v. Mortlock, 1 Cox, 141; Stevens v. Praed, 2 Ves. Jr. 519; Ware v. Horwood, 14 Ves. 31; Holmes v. Stateler, 57 Ill. 209; Foster v. Wood, 6 Johns. Ch. 89; Marine Ins. Co. v. Hodgson, 7 Cranch, 332; Hendrickson v. Hinckley, 17 How. 445; Danaher v. Prentiss, 22 Wis. 311; Forsythe v. McCreight, 10 Rich. Eq. 308; Wilsey v. Maynard, 21 Iowa, 107; Day v. Cummings, 19 Vt. 496; Vaughn v. Johnson, 9 N. J. Eq. 173; Harrison v. Davenport, 2 Barb. Ch. 77; Perrine v. Striker, 7 Paige, 598; Powell v. Watson, 6 Ired. Eq. 94; Hood v. N. R. R. Co., 23 Conn. 609; Clapp v. Ely, 10 N. J. Eq. 178.

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[3] It is for this reason that some writers have classified all cases in which the exercise of the jurisdiction depends upon the inadequacy of legal remedies under the head of the "concurrent" jurisdiction.

[4] Garth v. Cotton, 1 Ves. Sr. 524, 546, 1 Dick. 183, 3 Atk. 751, 1 Lead. Cas. Eq. 955, 987–1027; Jesus College v. Bloome, 3 Atk. 262, Amb. 54; Van Winkle v. Curtis, 3 N. J. Eq. 422; Weigel v. Walsh, 45 Mo. 560; Musselman v. Marquis, 1 Bush, 463, 89 Am. Dec. 637; Hicks v. Compton, 18 Cal. 206; Gause v. Perkins, 3 Jones Eq. 177, 69 Am. Dec. 728; Livingston v. Livingston, 6 Johns. Ch. 497, 499, 500, 10 Am. Dec. 353, and cases cited; Hawley v. Clowes, 2 Johns. Ch. 122; De Veney v. Gallagher, 20 N. J. Eq. 33; Coe v. Lake Mfg. Co., 37 N. H. 254, and cases cited; Burnham v. Kempton, 44 N. H. 78; Gallagher v. Fayette Co. R. R., 38 Pa. St. 102; Johnson v. Conn. Bank, 21 Conn. 148, 157; Hardesty v. Taft, 23 Md. 512, 530, 87 Am. Dec. 584; Mechanics' and Traders' Bank v. De Bolt, 1 Ohio St. 591; Eastman v. Amoskeag Mfg. Co., 47 N. H. 71, 78; Watson v. Sutherland, 5 Wall. 74, 78; Parker v. Winnipiseogee Co., 2 Black, 545, 550, and cases cited; Creely v. Bay State Brick Co., 103 Mass. 514; Morgan v. Palmer, 48 N. H. 336; Jenks v. Williams, 115 Mass. 217; Walker v. Zorn, 50 Ga. 370; Ziegler v. Beasley, 44 Ga. 56.

Another illustration may be found in the doctrines concerning the remedy of specific performance of contracts. The jurisdiction to enforce performance of contracts specifically is exclusive, for the remedy itself is most distinctively equitable and completely beyond the judicial methods of the law courts; yet the complaining party has a *legal* primary right created by the contract, and upon its violation is *always* entitled to the relief afforded by an action at law, — compensatory damages,— even though such damages are only nominal. The doctrine is fundamental that this jurisdiction will be called into operation, and the specific performance will be decreed only in those classes of cases in which, according to the views taken by the equity court, the legal remedy of compensatory damages is, from its essential nature, insufficient, and fails to do complete justice between the litigant parties.[5] It is true that in applying this doctrine the courts of equity have established the further rule that in general the legal remedy of damages *is* inadequate in all agreements for the sale or letting of land, or of any estate therein; and therefore in such class of contracts the jurisdiction is always exercised, and a specific performance granted, unless prevented by other and independent equitable considerations which directly affect the remedial right of the complaining party; but this result does not interfere with nor modify the principle which is under discussion.[6] [a]

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[5] Pomeroy on Specific Performance of Contracts, §§ 9–27.

[6] Various and sometimes very insufficient reasons have been given by judges for the foregoing rule, that the legal remedy is always to be regarded as *inadequate* in contracts relating to real estate, while on the other hand it is generally to be regarded as *adequate* in contracts relating to personal property. The distinction stated in the text, and which I am illustrating, may perhaps furnish a complete explanation. In an agreement for the sale of land, the vendee, in addition to his legal primary right, also obtains, in pursuance of the equitable doctrine of conversion, an equitable *estate* in the land,— an estate which equity regards as the real beneficial ownership, burdened simply or encumbered with the lien of the unpaid purchase price. Being thus the holder of the equitable estate in the subject-matter, the equi-

(a) The text is quoted in Maryland Clay Co. v. Simpers, 96 Md. 1, 53 Atl. 424, and cited in Christiansen v. Aldrich (Mont.), 76 Pac. 1007.

Another illustration may be drawn from the doctrines concerning the cancellation or surrender of written instruments on the ground of some actual fraud either in their original execution or in their subsequent use. Such remedy is entirely equitable; but when the injured party has a legal estate in the subject-matter or a legal primary right, he may set up the actual fraud as a defense in an action at law, if his legal title is thereby attacked, or a recovery is thereby sought against him on the instrument. Whether, under these circumstances, and at the suit of a party holding a legal interest or a legal primary right, the exclusive jurisdiction will be exercised for the purpose of protecting his estate or maintaining his right, by decreeing a cancellation or a surrender of the instrument thus affected by fraud, depends upon the question whether the legal remedies, either affirmative or defensive, open to the party, are inadequate to promote the ends of justice, and to afford him complete relief.[7] [b] In the same manner, where a bill of

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table owner of the land, he is, according to the doctrine stated in the text, entitled as a matter of course to the aid of a court of equity in protecting such estate and in clothing him with the legal title by means of a conveyance from the vendor. The exercise of the jurisdiction does not then depend, as it does when the jurisdiction is *merely* to confer equitable relief, upon the inadequacy of the legal remedy, but is rather a matter of equitable right in the vendee. The same rule is applied in cases of similar contracts to the vendor, partly because he acquires an equitable ownership of the purchase price, and partly because of the doctrine of mutuality. In the contracts relating to personal property, the equitable principle of conversion is not applied with the same strictness and with all the consequences as in contracts relating to real estate. The further rule, that the granting a specific performance *in all cases* depends upon certain equitable grounds affecting the remedial right of the plaintiff, or, to use the common but misleading expression, that it depends upon the judicial discretion of the court, plainly does not interfere with this view. See Pomeroy on Specific Performance of Contracts, §§ 35–43.

[7] Hamilton v. Cummings, 1 Johns. Ch. 517; Bushnell v. Hartford, 4 Johns. 301; Dale v. Roosevelt, 5 Johns. 174; Mitler v. Mitler, 18 N. J. Eq. 270, 19 N. J. Eq. 257, 457; Town of Glastonbury v. McDonald, 44 Vt. 453; Bissell v. Beckwith, 33 Conn. 357; Hall v. Whiston, 5 Allen, 126; Martin v. Graves, 5 Allen, 601; Sherman v. Fitch, 98 Mass. 59; Ferguson v. Fisk,

(b) The text is cited to this effect in Druon v. Sullivan, 66 Vt. 609, 30 Atl. 98; Andrews v. Frierson, 134 Ala. 626, 33 South. 6.

exchange, promissory note, or other negotiable security has been obtained by fraud, conversion, or other like manner which would create a valid defense at law as between the original parties, the acceptor, maker, or other party apparently liable on the instrument may invoke this jurisdiction of equity, before the maturity of the paper, against the holder, and procure an injunction restraining him from making any transfer to a *bona fide* purchaser, and even the final relief of a cancellation or surrender; because in such a case, if the present unlawful holder, although the legal defense to an action by him would be perfect, should transfer the security to a *bona fide* purchaser, such legal defense would be cut off, and the injured party would be without adequate and complete remedy in a court of law.[c] This doc-

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28 Conn. 501; McHenry v. Hazard, 45 N. Y. 580. In Hamilton v. Cummings, 1 Johns. Ch. 517, Chancellor Kent stated the rule concerning the exercise of the jurisdiction as follows: "Perhaps the cases may all be reconciled on the general principle that the exercise of this power is to be regulated by sound discretion, as the circumstances of the individual cases may dictate, and that the resort to equity, to be sustained, must be expedient, either because the instrument is liable to abuse from its negotiable character, or because the defense, not arising upon its face, may be difficult or uncertain at law, or from some other special circumstances peculiar to the case, and rendering a resort to chancery proper and clear of all suspicion of any design to promote expense and litigation." I would remark that the statement in this extract that the exercise of the jurisdiction is a matter of "*discretion*" in the court, which was a favorite mode of expression among some equity judges of a former day, is very misleading, no matter how much the word is guarded by adding "sound" or "judicial." No part of the regular jurisdiction of equity can depend upon the "discretion" of the judge, if the word is used in any signification properly belonging to it. In Martin v. Graves, 5 Allen, 601, the court thus stated the general rule: "Whenever a deed or other instrument exists, which may be vexatiously or injuriously used against a party after the evidence to impeach or invalidate it is lost, or which may throw a cloud of suspicion over his title or interest, *and he cannot immediately protect or maintain his right by any course of proceedings at law*, a court of equity will afford relief by directing the instrument to be delivered up and canceled, or by making any other decree which justice and the rights of the parties may require."

(c) The text is cited in Louisville, N. A. & C. R. R. Co. v. Ohio Val. I. & C. Co., 57 Fed. 42, 45; Druon v. Sullivan, 66 Vt. 609, 30 Atl. 98 (cancellation of negotiable instruments not generally granted when applied for *after* their maturity).

trine extends, under similar circumstances, to the transfer of lands, goods, and things in action to a *bona fide* purchaser, where the rights and equities of the original grantor, vendor, or owner would be cut off, and he would be deprived of complete relief at law, as against the *bona fide* transferee.[8] Similar illustrations might be taken from the settled rules concerning the use of the exclusive jurisdiction to grant the remedies of reformation, re-execution, interpleader, and other strictly equitable remedies, in order to maintain, protect, and enforce estates, interests, and primary rights of the complaining party, which are legal in their nature; but the foregoing examples are sufficient to explain the distinction, and to show the generality of the principles stated in the preceding paragraph.

§ 222. **Summary of the Jurisdiction as Affected by the Principle.**— The principle which has been thus explained in the preceding paragraphs of this chapter, and which is not a mere speculative theory, but is fully sustained by settled rules taken from every part of the equity jurisprudence, presents the entire equitable jurisdiction in the form of a simple, well-defined, and consistent system, the result of a few plain and harmonious rules. Laying out of view for the present that special branch of equity which is called the "auxiliary jurisdiction," and which has become obsolete except in a few of our American states, the administration of the equitable jurisdiction, and the resulting doctrines which make up the equity jurisprudence, may be separated, according to a natural order, into four distinct classes, namely: 1. Where the primary right or interest of the complaining party which has been invaded is purely equitable,— one which the doctrines of equity jurisprudence alone create and recognize,— and his remedial right and the remedies which he obtains are also wholly equitable; for example, where an equitable owner of land, under the doctrines of trust or of conversion, procures the declarative relief establishing his estate, and the relief of specific performance by means of a conveyance of the legal title. 2. Where the primary right or interest of the complaining party is in like manner equitable, and the remedies which he asks and receives are legal; that is, are of the same kind as those conferred by courts of law; for example, where the equitable owner of a fund, through an equitable assignment, establishes his ownership and recovers the fund by a final judgment which is simply pecuniary. 3. Where the primary right or interest of the complaining party is legal,— one which is created by the law, and cognizable by the law courts,— and his remedial right, and the remedies which he procures, are entirely equitable; for example, where the legal owner of property obtains protection to his possession or enjoyment by means of injunction against tortious acts, or against wrongful proceedings at law, or protects his title from disturbance, or himself from wrongful demands, by means of the remedy of cancellation, and the like. 4. Where the primary right or interest of the complaining party is legal, recognized and maintainable by the law courts, and the remedies which he obtains are also legal,— of the same kind as those administered and conferred by the courts of law,— recoveries of money, or of specific lands or chattels; for example, where a surety sues his principal, under his right of exoneration, to recover back the money paid out on behalf of such principal, or sues his co-surety to recover money, under his right of contribution; or where an owner in common of land by a legal estate therein recovers his own specific portion by a partition, and the like. All possible cases of equity may be referred to one or the other of these four divisions. The first three belong to the " exclusive " jurisdiction; the fourth constitutes the

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[8] Hamilton v. Cummings, 1 Johns. Ch. 517; Delafield v. Illinois, 26 Wend. 192; Van Doren v. Mayor of New York, 9 Paige, 389; Cox v. Clift, 2 N. Y. 118; Town of Glastonbury v. McDonald, 44 Vt. 453; Bank of Bellows Falls v. Rutland, etc., R. R. Co., 28 Vt. 470; Franklin v. Green, 2 Allen, 520; Sherman v. Fitch, 98 Mass. 59; Poor v. Carleton, 3 Sum. 70; Ferguson v. Fisk, 28 Conn. 501; Mitler v. Mitler, 18 N. J. Eq. 270, 19 N. J. Eq. 257; Peirsoll v. Elliott, 6 Pet. 95.

"concurrent" jurisdiction. Furthermore, in the first and second, the jurisdiction is not only exclusive, but is exercised as a matter of right in behalf of the complaining party whenever he has an equitable estate, interest, or primary right, according to the doctrines of equity jurisprudence. In the third division, although the jurisdiction always exists and is exclusive, it is not exercised on behalf of the complaining party as a matter of right in him; its proper exercise depends upon the inadequacy of the legal remedies which he might obtain to do him complete justice. Finally, in the fourth division, the very existence as well as the exercise of the jurisdiction, being concurrent, depends upon the inadequacy of the remedies which the party could obtain from a court of law, owing partly to the form of those remedies themselves, and partly to the imperfection of the legal mode of procedure.

SECTION II.

DISCOVERY AS A SOURCE OR OCCASION OF JURISDICTION.

ANALYSIS.

§ 223. General doctrine as to discovery as a source of concurrent and an occasion for exclusive jurisdiction.
§§ 224, 225. Early English rule.
§ 226. Present English rule.
§§ 227–229. Broad rule established in some American states.
§ 229. The limitations of this rule.
§ 230. The true extent and meaning of this rule examined.

§ 223. **General Doctrine.**[a]— It has already been shown that, under the general jurisdiction of equity, a suit of discovery alone without relief might be maintained in order to procure admissions from the defendant to be used on the trial of an action at law between the same parties; and that in every equitable suit brought for any purpose of relief over which a court of equity has jurisdiction, the plaintiff may make his pleading a means of discovery, and may compel the defendant to disclose facts within his knowledge material to the issue, which can be used as evidence on the hearing. In addition, however, to these original and strictly proper functions of discovery, the doctrine has been established in many of the American states, and to a very limited and partial extent in England, that discovery itself is, under certain circumstances, an independent source or foundation of the equitable jurisdiction to adjudicate upon matters and to award reliefs which are otherwise purely legal. In other words, that, under certain circumstances, where the plaintiff has asked and obtained a discovery, the court of equity may go on and decide the whole issue, and grant the requisite remedies, although the subject-matter of the controversy and the primary rights and interests of the party are wholly legal in their nature, and the remedies conferred are of such a kind as a court of law can administer. *A fortiori*, then, may discovery be a proper occasion for exercising the jurisdiction in cases belonging to the exclusive jurisdiction, where an equitable remedy is needed in support of a legal right or interest. This doctrine has, of course, become obsolete wherever the auxiliary suit for a discovery has itself been abolished; but since the doctrine prevailed in some states which still retain the separate equity jurisdiction, and the ancillary method of discovery as an incident thereof, some discussion of it seems to be necessary.

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[a] This and the following sections are cited in Yates v. Stuart's Adm'r, 39 W. Va. 124, 19 S. E. 423; Collier v. Collier (N. J. Eq.), 33 Atl. 193.

§ 224. **Early English Rule.**— The earlier English cases fail to establish any rule, and leave the matter in a condition of uncertainty. There are *dicta* of eminent judges and some decisions which undoubtedly go to the length of holding, as a general proposition, that *wherever* a party is entitled to and obtains a discovery in a suit brought directly and primarily for that purpose, the court of equity will go on and decide the issues and grant the requisite relief, although the subject-matter of the controversy and the primary rights involved and the reliefs conferred are not otherwise within even the concurrent equitable jurisdiction, but are cognizable by the courts of law, and the legal remedies obtainable in the particular case are adequate. This conclusion is said to result from the doctrine that when a court of equity has obtained jurisdiction of a cause for any purpose, it will go on and determine the entire matters in dispute, in order to avoid a multiplicity of suits.[1] These expressions of judicial opinion are certainly very loose, and unless carefully limited, would extend the equitable jurisdiction far beyond its legitimate boundaries. The doctrine has therefore been stated in a much more guarded and restricted manner. An early treatise of high authority, after admitting the impossibility of extracting a more definite rule from the conflicting decisions, says: "The court, having acquired cognizance of the suit for the purpose of discovery, will entertain it for the purpose of relief, in most cases of fraud, account, accident, and mistake."[2] Later decisions have been still more guarded, and seem to reject discovery as a distinct and independent source or foundation of the equitable jurisdiction in any cases; that is, to deny that relief would be granted merely as a consequence of discovery in any case which did not otherwise come within some recognized branch of the equitable jurisdiction, either exclusive or concurrent.[3]

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[1] The earlier English cases and *dicta* are by no means unanimous in supporting this conclusion; some of them are directly opposed to it, and there is an irreconcilable conflict among them: See Adley v. Whitstable, 17 Ves. 329, per Lord Eldon; Ryle v. Haggie, 1 Jacob & W. 234, 236, 237, per Sir Thomas Plumer; McKenzie v. Johnston, 4 Madd. 373, per Sir John Leach; Parker v. Dee, 2 Cas. Ch. 200, 201, per Lord Nottingham; Jesus College v. Bloom, 3 Atk. 262, 263, Amb. 54; Geast v. Barker, 2 Brown Ch. 61; Duke of Leeds v. New Radnor, 2 Brown Ch. 388, 519; Bishop of Winchester v. Knight, 1 P. Wms. 406; Kemp v. Pryor, 7 Ves. 248, 249, per Lord Eldon.

[2] Fonblanque's Equity, b. 1, chap. 1, § 3, note *f:* "The concurrence of jurisdiction may, in the greater number of cases in which it is exercised, be justified by the propriety of preventing a multiplicity of suits; for as the mode of proceeding in courts of law requires the plaintiff to establish his case without enabling him to draw the necessary evidence from the examination of the defendant, justice could never be attained at law in those cases where the principal facts to be proved by one party are confined to the knowledge of the other party. In such cases, therefore, it becomes necessary for the party wanting such evidence to resort to the extraordinary powers of a court of equity, which will compel the necessary discovery; and the court, having acquired cognizance of the suit for the purpose of discovery, will entertain it for the purpose of relief in *most* cases of fraud, account, accident, and mistake."

§ 225. If it be generally true that a court "having acquired jurisdiction of a suit for the purpose of discovery will entertain it for purpose of relief in most cases of fraud, account, accident, and mistake," what is the real significance of this proposition? It does not assert that mere discovery is an independent *source* of jurisdiction in any case *where it would not otherwise exist;* it simply regards a discovery obtained as the proper occasion for exercising the jurisdiction, sometimes exclusive, sometimes concurrent, in certain classes of cases where such jurisdiction already exists,— that is, may be exercised,— in pursuance of settled doctrines of the equity jurisprudence. In many cases of fraud, mistake, or accident, the exclusive jurisdiction exists to award purely equitable remedies in support of legal interests and primary rights of the plaintiff; and such jurisdiction will be *exercised* in these cases, according to the principle heretofore explained, whenever the legal remedies obtainable therein are inadequate. Also, in many cases of fraud, mistake, accident, or account, the concurrent jurisdiction exists to award remedies of a kind which are purely legal, such as pecuniary recoveries, in support of the legal interests and primary rights of the plaintiff, whenever the remedies obtainable from a court of law are inadequate, through the imperfection of the legal modes of procedure. Now, the proposition quoted above simply asserts that in all cases falling within either of the two classes last mentioned, in all such cases belonging either to the exclusive or to the concurrent jurisdiction, the very fact that a discovery is necessary for the plaintiff, and is obtained by him, shows of itself, and independent of any other considerations, that the case is one in which the ordinary remedies at law are inadequate, and therefore that the equitable jurisdiction is proper in such case. In other words, the discovery obtained in such cases belonging to the exclusive jurisdiction is of itself a fact showing that the legal remedies are inadequate to do complete justice to the parties therein, and that the exercise of the exclusive jurisdiction, by conferring equitable remedies, is both proper and necessary. Also, the discovery obtained in such cases belonging to the concurrent jurisdiction is of itself a fact showing that the remedies recoverable at law by the parties therein are inadequate, and that the concurrent equitable jurisdiction of the controversy exists, and should be enforced by deciding all the issues and awarding the appropriate reliefs, although they may be of the same kind as those conferred at law. This view, as it seems to me, removes all conflict appearing in the English decisions and *dicta*, and brings the effect of discovery into a complete harmony with the general principles concerning jurisdiction. It rejects the notion that the mere fact of discovery has any power to enlarge the equitable jurisdiction, or to extend that jurisdiction, whether exclusive or concurrent, to any cases in which it does not otherwise exist; on the other hand, it admits that, in cases otherwise belonging either to the exclusive or the concurrent jurisdiction, a discovery obtained may be the *determining fact* upon which the proper exercise of that jurisdiction depends,— the fact which, without any other accident, renders the legal remedies inadequate, and thus sets in motion the judicial machinery of equity.

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[3] Thus in Pearce v. Creswick, 2 Hare, 293, per Wigram, V. C.: "The first proposition relied upon by the plaintiff in support of the equity of his bill was this, that the case was one in which the right to discovery would carry with it the right to relief. And undoubtedly *dicta* are to be met with tending directly to the conclusion that the right to discovery may entitle a plaintiff to relief also. In Adley v. The Whitstable Co., 17 Ves. 329, Lord Eldon says: 'There is no mode of ascertaining what is due except an account in a court of equity; but, it is said, the party may have discovery, and then go to law. The answer to that is, that the right to the discovery carries along with it the right to relief in equity.' In Ryle v. Haggie, 1 Jacob & W. 236, Sir Thomas Plumer said: 'When it is admitted that a party comes here properly for the discovery, the court is never disposed to occasion a multiplicity of suits by making him go to a court of law for the relief.' And in McKenzie v. Johnston, 4 Madd. 373, Sir John Leach says: 'The plaintiff can only learn from this discovery of the defendants how they have acted in the execution of their agency, and it would be most unreasonable that he should pay them for that discovery, if it turned out that they had abused his confidence; yet such must be the case if a bill for relief will not lie.' Now, in a case in which I think that justice requires the court, if possible, to find an equity in this bill, to enable it, once for all, to decide the question between the parties, I should reluctantly deprive the plaintiff of any remedy to which the *dicta* I have referred to may entitle him. But, I confess, the arguments founded upon these *dicta* appear to me to be exposed to the objection of proving far too much. They can only be reconciled with the ordinary practice of the court, by understanding them as having been uttered with reference in each case to the subject-matter to which they were applied, and not as laying down any abstract proposition so wide as the plaintiff's argument requires. I think this part of the plaintiff's case cannot be stated more highly in his favor than this, that the necessity a party may be under (from the very nature of a given transaction) to come into equity for discovery, is a circumstance to be regarded in deciding upon the distinct and independent question of equitable jurisdiction; further than this I have not been able to follow this branch of the plaintiff's argument." And see Mitchell v. Greene, 10 Met. 101; Pease v. Pease, 8 Met. 395.

§ 226. **Present English Rule.**— The conclusion thus reached is fully sustained by the more modern English decisions. The rule fully settled by the English courts, before the auxiliary jurisdiction over discovery was finally abolished by the supreme court of judicature act,[1] was, that if the controversy and the issues involved in it are not otherwise within the equitable jurisdiction, either exclusive or concurrent, and the legal remedies obtainable in the case are adequate, a bill properly for discovery without any relief, in aid of a pending or expected action at law, can alone be maintained; and if in such a bill the plaintiff demands relief, either general or special, the whole is demurrable.[2] This rule confines discovery to its legitimate function of furnishing evidence, and prevents it from operating to extend the equitable jurisdiction to causes which would otherwise be solely cognizable at law.

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[1] See *ante*, § 193.

[2] Foley v. Hill, 2 H. L. Cas. 28, 37; Morris v. Morgan, 10 Sim. 341; Benyon v. Nettlefold, 3 Macn. & G. 94; Deare v. Attorney-General, 1 Younge & C. 205, 206; Albretcht v. Sussman, 2 Ves. & B. 328; and see Story's Eq. Pl., § 312, note 3, and cases there cited. The same doctrine as to the effect of discovery upon the jurisdiction has been adopted in some American states: Mitchell v. Greene, 10 Met. 101; Pease v. Pease, 8 Met. 395; Little v. Cooper,

§ 227. **American Rule.**— A very different doctrine has been asserted and perhaps established by the courts of several American states, in which the separate jurisdiction of chancery formerly existed, and of other states in which such separate jurisdiction is still preserved; and the doctrine thus affirmed has sometimes been spoken of by writers and judges as the distinctively American doctrine on the subject. It may well be doubted, however, whether, with all the limitations and exceptions which have been suggested, any doctrine can be considered as having been fairly established by a preponderance of judicial decisions (not of mere *dicta*) which goes beyond the general proposition quoted in a preceding paragraph, at one time admitted by English text-writers.[1] The rule has been asserted by many American courts in very general terms, that whenever a court of equity has obtained jurisdiction of a cause for any one purpose, it may retain such cause for the purpose of adjudicating upon all the matters involved, and of granting complete relief. As a consequence of this principle, whenever the court can entertain a suit for discovery, and a discovery is obtained, the court will go on and decide the whole issue, and will grant to the plaintiff, if he has prayed for it, whatever relief is proper, even though such relief is legal in its

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10 N. J. Eq. 273; Miller v. Scammon, 52 N. H. 609, 610; Stone v. Anderson, 26 N. H. 506, 518; Stevens v. Williams, 12 N. H. 246; Tappan v. Evans, 11 N. H. 311, 325.[a]

[1] *Ante*, § 224. I refer to the general proposition laid down in Fonblanque's Equity, that when the court has acquired jurisdiction for a discovery, it will entertain jurisdiction for relief in *most* cases of fraud, accident, mistake, and account.

(a) See also De Bevoise v. H. & W. Co. (N. J. Eq.), 58 Atl. 91; People's Nat. Bank v. Kern, 193 Pa. St. 59, 44 Atl. 331; India Rubber Co. v. Consol. Rubber Tire Co., 117 Fed. 354; Safford v. Ensign Mfg. Co. (C. C. A.), 120 Fed. 480, 483. In the last case it is stated that the federal equity practice is modeled on the established English practice, and that "in a case in which discovery and relief are sought, but the only ground for equitable relief appears to be a discovery of evidence to be used in the enforcement of a purely legal demand, the jurisdiction cannot be sustained."

kind, and could have been obtained by an action at law.[2] [a] These general expressions would seem to extend the concurrent jurisdiction of equity almost without limit, over matters ordinarily cognizable at law. It is not a little remarkable that courts which, in relation to some matters, have shown a strong tendency to restrict the equitable jurisdiction, upon the alleged ground that the remedies at law are adequate, should thus have opened the door for an apparently indefinite extension of the jurisdiction over large classes of cases in which, excepting the single incident of a discovery of *evidence,* the legal remedies are confessedly adequate.[3]

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[2] Rathbone v. Warren, 10 Johns. 587, 596; King v. Baldwin, 17 Johns. 384, 8 Am. Dec. 415; Gelston v. Hoyt, 1 Johns. Ch. 543; Seymour v. Seymour, 4 Johns. Ch. 409; Shepard v. Sanford, 3 Barb. Ch. 127; Sanborn v. Kittredge, 20 Vt. 632, 50 Am. Dec. 58; Holmes v. Holmes, 36 Vt. 525; Traip v. Gould, 15 Me. 82; Isham v. Gilbert, 3 Conn. 166; Middletown Bank v. Russ, 3 Conn. 135, 139, 8 Am. Dec. 164; Lyons v. Miller, 6 Gratt. 438, 52 Am. Dec. 129; Chichester's Executors v. Vass's Administrators, 1 Munf. 98, 4 Am. Dec. 531; Sims v. Aughtery, 4 Strob. Eq. 121; Ferguson v. Waters, 3 Bibb, 303; Brooks v. Stolley, 3 McLean, 523; Warner v. Daniels, 1 Wood. & M. 90; Foster v. Swasey, 2 Wood. & M. 217; Hepburn v. Dunlop, 1 Wheat. 197; Russell v. Clark's Executors, 7 Cranch, 69. In the last-named case, the United States supreme court went so far as to announce the following universal rule: "That if certain facts essential to the merits of a claim *purely legal* be exclusively within the knowledge of the party against whom that claim is asserted, he may be required in a court of chancery to disclose those facts; and the court, being thus rightfully in possession of the cause, will proceed to determine the whole matter in controversy."

(a) The text is cited in Collier v. Collier (N. J. Eq.), 33 Atl. 193. See also Wallis v. Skelly, 30 Fed. 747; New York Ins. Co. v. Roulet, 24 Wend. 505 (opinion of Senator Edwards); Wood v. Hudson, 96 Ala. 469, 11 South. 530; Thompson v. Whitaker Iron Co., 41 W. Va. 574, 23 S. E. 795; Smith v. Smith's Adm'r, 92 Va. 696, 24 S. E. 280; Roanoke St. R'y Co. v. Hicks, 96 Va. 510, 32 S. E. 295; Dock v. Dock, 180 Pa. St. 14, 57 Am. St. Rep. 617, 36 Atl. 411 (on a bill for discovery and production of private letters, recovery of the letters may be decreed); Lancy v. Randlett, 80 Me. 169, 6 Am. St. Rep. 169. But see People's Nat. Bank v. Kern, 193 Pa. St. 59, 44 Atl. 331. In Miller v. U. S. Casualty Co., 61 N. J. Eq. 110, 47 Atl. 509, it was said that "the court has not jurisdiction to decree relief upon a purely legal claim under the general prayer for relief" in a bill for discovery. It has been held that equity will take jurisdiction of accounts which are all on one side only when discovery is sought and is material to the relief. Yates v. Stuart's Adm'r, 39 W. Va. 124, 19 S. E. 423. It is frequently stated that equity will take jurisdiction of accounts when discovery is necessary. Lafever v. Billmyer, 5 W. Va. 33; Coffman v. Sangston, 21 Gratt. 263.

§ 228. It is plain that this doctrine, although expressed in such broad terms, cannot be intended to operate in all of its generality. Taken literally and without limitation, it would break down the barriers between the jurisdictions in equity and at law, and would virtually render the equitable jurisdiction universal by bringing every judicial controversy within its scope. Before the modern legislation concerning witnesses and evidence, the actions at law were very few in which one or the other of the parties might not be aided by a discovery, and might not, in conformity with settled rules, maintain a suit for a discovery. If a discovery, therefore, rightfully demanded and obtained, were of itself sufficient to bring the entire cause within the jurisdiction of chancery for final adjudication upon its merits, it is plain that almost every kind and class of purely legal actions could thus be brought within the equitable concurrent jurisdiction; and the fundamental principle, that the concurrent equitable jurisdiction only exists in cases where the legal remedies are inadequate, would practically be abrogated,— would become an empty formula. This conclusion, which is a necessary deduction from the assumed premises, shows that the premises themselves are false. The doctrine of which it is a consequence cannot be true in all the generality of its statement.[1]

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[3] The extreme reluctance of some American courts to extend the jurisdiction of equity, even where such extension consists solely in applying familiar principles to new conditions of fact, is in marked contrast with the freedom shown by English chancery judges in developing the equity jurisprudence. An illustration may be seen in their refusal to use the injunction to restrain trespasses, or to restrain the breach of contracts, or to use the mandatory injunction, in many instances where such use has become common in England. In the face of this tendency, the adoption by the same courts of a general rule, which, if not limited, would sweep almost every case at law within the equitable jurisdiction, is, to say the least, very remarkable.

[1] See Foley v. Hill, 2 H. L. Cas. 28, 37, per Lord Cottenham, where this able chancellor thus described the effect of the notion that discovery alone is a source of jurisdiction: "It is not because you are entitled to discovery

§ 229. Limitations were therefore established which very much restricted the operation of the doctrine. In the first place, the rule is settled in those American courts which admit the general doctrine that when the action is one cognizable at law, in which the rights and remedies are legal, and which does not otherwise belong to the equitable jurisdiction, but which the plaintiff brings in a court of equity under the doctrine that a discovery of itself enables equity to extend its concurrent jurisdiction over the whole cause, he must allege that the facts concerning which he seeks a disclosure are material to his cause of action, and that he has no means of proving those facts by the testimony of witnesses or by any other kind of evidence used in courts of law, that the only mode of establishing them is by compelling the defendant to make disclosure, and therefore that a discovery by suit in equity is indispensable.[a] Without these allegations the plaintiff cannot avail himself of

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that therefore you are entitled to an account. That is entirely a fallacy. That would, if carried to the extent to which it would be carried by the argument, make it appear that *every* case is a matter of equitable jurisdiction, and that where a plaintiff is entitled to a demand he may come to a court of equity for a discovery. But the rule is, that where a case is so complicated, or where from other circumstances the remedy at law will not give adequate relief, then the court of equity assumes jurisdiction." As this case was one for an accounting, the chancellor, in his remarks, was speaking directly of the remedy for an account.

(a) Cited to this effect in Thompson v. Whitaker Iron Co., 41 W. Va. 574, 23 S. E. 795; Lancey v. Randlett, 80 Me. 169, 13 Atl. 686, 6 Am. St. Rep. 169. To the same effect, see Marsh v. Davison, 9 Paige, 580; Robson v. Doyle, 191 Ill. 566, 61 N. E. 435 (*dictum*); Wolf v. Underwood, 96 Ala. 329, 11 South. 344; Shackelford v. Bankhead, 72 Ala. 476; Sullivan v. Lawler, 72 Ala. 74; Pollak v. H. B. Claflin Co. (Ala.), 35 South. 645 (citing Guice v. Parker, 46 Ala. 616; Dickinson v. Lewis, 34 Ala. 638, 645; Continental Life Ins. Co. v. Webb, 54 Ala. 688; Virginia A. M. & M. Co. v. Hale, 93 Ala. 542, 9 South. 256). "To make his prayer for discovery a ground of equitable jurisdiction, plaintiff should allege his inability to establish at law the facts of which the discovery is sought. It would have been otherwise were the bill merely for a discovery." Cecil Nat. Bank v. Thurber, 59 Fed. 913, 8 C. C. A. 365, 8 U. S. App. 496. In Brown v. Swann, 10 Pet. 497, the court said: "The courts of common law having full power to compel the attendance of witnesses, it follows that the aid of equity can alone be wanted for a discovery in those cases where there is no witness, to prove what is sought from the conscience the doctrine, and obtain relief as a consequence of the discovery. Nor are these allegations a mere empty form, a mere fiction of pleading; they may be controverted, must be supported by proof, and if disproved, the whole foundation for the equitable interference in the case would fail.[1] In the second place, if the defendant by his answer fully denies all the allegations of fact with respect to which a discovery is demanded, the whole suit must fail; the court of equity cannot grant the relief prayed for, since its jurisdiction to give relief in such causes, according to the very assumption, rests upon the fact of a discovery rightfully obtained.[2] [b]

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[1] Gelston v. Hoyt, 1 Johns. Ch. 543; Seymour v. Seymour, 4 Johns. Ch. 409; Laight v. Morgan, 1 Johns. Cas. 492, 2 Caines Cas. 344; Bank of U. S. v. Biddle, 2 Pars. Cas. 31; Lyons v. Miller, 6 Gratt. 427, 438, 52 Am. Dec. 129; Duvals v. Ross, 2 Munf. 290, 296; Bass v. Bass, 4 Hen. & M. 478; Pryor v. Adams, 1 Call, 382, 1 Am. Dec. 533; Stacy v. Pearson, 3 Rich. Eq. 148, 152; Sims v. Aughtery, 4 Strob. Eq. 103, 121; Merchants' Bank v. Davis, 3 Ga. 112; Bullock v. Boyd, 2 A. K. Marsh. 322; Emerson v. Staton, 3 T. B. Mon. 116, 118. In an early case, Chancellor Kent, through a mistaken view concerning discovery, held that these same allegations by the plaintiff are essential in every equity suit for a mere discovery alone without any relief, in aid of a pending or expected action at law, and that if such averments are omitted from the bill, the suit for a discovery must fail: Gelston v. Hoyt, 1 Johns. Ch. 543. This erroneous ruling was followed by the same court in Seymour v. Seymour, 4 Johns. Ch. 409; Leggett v. Postley, 2 Paige, 599; and by other courts in other cases. But this mistaken view has been corrected, and these decisions overruled, and the requirement given in the text confined to cases where the plaintiff demands relief legal in its nature as a direct consequence of the discovery: March v. Davison, 9 Paige, 580; Vance v. Andrews, 2 Barb. Ch. 370. And see other cases, *ante*, § 197, note, where this point is more fully explained.

[2] This results from the general principle concerning all discovery, stated in a preceding section, that the actual *discovery* obtainable by the plaintiff

of the interested party. Courts of chancery have, then, established rules for the exercise of this jurisdiction, to keep it within its proper limits, and to prevent it from encroaching upon the jurisdiction of the courts of common law. The rule to be applied to a bill seeking for discovery from an interested party is that the complainant shall charge in his bill that the facts are known to the defendant, and ought to be disclosed by him, and that the complainant is unable to prove them by other testimony; and when the facts are desired to assist a court of law in the progress of a case, it should be affirmatively stated in the bill that they are wanted for such purpose." This was a case for discovery and relief.

(b) In Buzard v. Houston, 119 U. S. 355, 7 Sup. Ct. 249, the court said: "It is enough to say that the

§ 230. **True Meaning of the American Rule.**— By means of these two restrictive rules, the general expressions of the American judges, before quoted, are very much limited, and their operation is brought within much narrower bounds. The so-called American doctrine concerning the effect of discovery upon the equitable jurisdiction is thus practically as follows: Whenever, in a controversy purely legal, depending upon legal interests and primary rights of the plaintiff, and seeking to obtain final reliefs which are wholly legal, the plaintiff prays for a discovery as a preliminary relief, and alleges and proves that such a discovery is absolutely essential to the maintenance of his contention; that there is no other mode of obtaining the requisite proofs to sustain his cause; that he is utterly unable to establish the issues on his part by the testimony of witnesses, or by any other kind of evidence admissible in

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depends upon the disclosures of the defendant in his answer. While the defendant can be compelled to answer every material averment and interrogatory of the bill, distinctly and squarely, *what* he shall answer rests within his own conscience. His answer cannot, *for the purpose of discovery merely*,— that is, considered merely as evidence,— be controverted. If he distinctly denies all the allegations of the plaintiff, that is the end of the *discovery*, and as a matter of necessary consequence, an end of the relief in this class of suits. See *ante*, §§ 204, 206; Russell v. Clarke's Ex'rs, 7 Cranch, 69; Ferguson v. Waters, 3 Bibb, 303; Robinson v. Gilbreth, 4 Bibb, 184.

case clearly falls within the statement of Chief Justice Marshall: 'But this rule cannot be abused by being employed as a mere pretext for bringing causes, proper for a court of law, into a court of equity. If the answer of defendant discloses nothing, and the plaintiff supports himself by evidence in his own possession, unaided by the confessions of defendant, the established rules limiting jurisdiction require that he should be dismissed from the court of chancery, and permitted to assert his rights in a court of law." See also Cecil Nat. Bank v. Thurber, 59 Fed. 913, 8 C. C. A. 365, 8 U. S. App. 496; Hale v. Clarkson, 23 Gratt. 42; Collins v. Sutton, 94 Va. 127, 26 S. E. 415. A bill seeking discovery should not be retained after the answer has denied the matter sought. Walker v. Brown, 58 Fed. 23; Brown v. Swann, 10 Pet. 497; Insurance Co. v. Stanchfield, 1 Dill. 424. Of course, if the bill is brought for discovery and *equitable* relief, it may be retained for the latter purpose when the first purpose fails, if it states a case calling for the exercise of equitable jurisdiction. Bouton v. Smith, 113 Ill. 481.

courts of law,— so that an action at law is utterly impracticable; and whenever, in such case, the defendant does not wholly deny the facts which the plaintiff alleges as the basis of his recovery, but makes an actual discovery by his answer disclosing a right of action in the plaintiff,— then the court of equity having jurisdiction of such a case to compel a discovery acquires a jurisdiction over it for all purposes, and may go on and determine all the issues, and decree full and final relief, although the relief so given is of the same kind as that granted by courts of law in similar controversies.[1] [a] It is plain, therefore, that the doctrine thus narrowed rests solely upon the essential fact that the successful prosecution of an action at law, and the recovery by the plaintiff of the reliefs to which he is justly entitled in a court of law, are rendered wholly impossible by the operation of the arbitrary rules of the law concerning the examination of witnesses, the testimony of the parties themselves, and the production of evidence generally.[2] The question then arises, What effect has been produced upon this particular doctrine by the modern legislation, which authorizes the examination of parties on the trial of actions, abolishes the disabilities of witnesses, and removes the other legal restrictions upon the admissibility of evidence? In my opinion, the necessary effect of such legislation has been to abrogate the doctrine altogether, even in those states where "discovery" is still retained. In fact, the foundation upon which this peculiar American doctrine concerning the effect of discovery in the classes of cases above described was rested by the courts, has been wholly swept away by these reformatory statutes. It is simply impossible for a plaintiff now to allege with truth, and of course impossible for him to prove in any controversy legal in its nature, that a discovery by means of a suit in equity is *essential* to his maintaining his cause of action, and that he is unable to establish the issues on his part by the testimony of witnesses, and by other evidence admissible in courts of law. If a plaintiff has a legal cause of action, and can substantiate it by means of a discovery obtained from his opponent in equity, then it must necessarily follow that

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[1] Gelston v. Hoyt, 1 Johns. Ch. 543; Seymour v. Seymour, 4 Johns. Ch. 409; Rathbone v. Warren, 10 Johns. 587, 596; Shepard v. Sanford, 3 Barb. Ch. 127; Sanborn v. Kittredge, 20 Vt. 632, 50 Am. Dec. 58; Holmes v. Holmes, 36 Vt. 525; Traip v. Gould, 15 Me. 82; Isham v. Gilbert, 3 Conn. 166; Middletown Bank v. Russ, 3 Conn. 135, 139, 8 Am. Dec. 164; Bank of U. S. v. Biddle, 2 Pars. Cas. 31; Lyons v. Miller, 6 Gratt. 427, 438, 52 Am. Dec. 129; Duvals v. Ross, 2 Munf. 290, 296; Stacy v. Pearson, 3 Rich. Eq. 148, 152; Sims v. Aughtery, 4 Strob. Eq. 103, 121; Brooks v. Stolley, 3 McLean, 523; Warner v. Daniels, 1 Wood. & M. 90; Foster v. Swasey, 2 Wood. & M. 217; Russell v. Clark, 7 Cranch, 69.

[2] It should be remembered that at the time when this equity doctrine was established the rules of the law concerning evidence were extremely arbitrary, and productive of great injustice. Actions at law based upon the plainest right might frequently fail from the impossibility of proving the facts in conformity with the legal rules of evidence. Not only were parties to actions unable to testify for themselves or for their opponents, but all persons having *any* pecuniary interest in the event of the action were disabled; the door was closed against the admission of the truth from many directions. An appeal to the powers of equity to compel a discovery from the opposite party was therefore the only possible mode in very many instances of eliciting the facts which would make out the plaintiff's cause of

(a) Quoted in Virginia & A. Min. & Mfg. Co. v. Hale, 93 Ala. 542, 9 South. 256. Cited in Wood v. Hudson, 96 Ala. 469, 11 South. 530.

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action in suits of a purely legal nature. It is true, there was no *absolute necessity* of allowing the equity court to go on and decide the whole cause after a discovery was made. In such cases, as well as in all others where a separate bill of discovery had been filed, after the discovery was made the plaintiff might return to a court of law, prosecute his legal action in that tribunal, and use the defendant's answer containing the discovery as evidence to support his own side on the trial of that action. This latter practice became finally settled in England, as has already been shown. The other practice of the equity courts in this country, in assuming jurisdiction to decide the entire issues, and to decree complete relief, where a discovery had actually been made in cases *which could not have been tried at law* without such discovery, was doubtless adopted from motives of policy and of benefit to the parties themselves, since they were thereby saved from the labor, time, and expense of a second action and trial at law, after they had already in effect tried the entire matters in difference between them. Still the doctrine deprived parties of their right to a jury trial, under circumstances which did not render such deprivation at all necessary. After a discovery was once obtained, a trial of the issues at law by a jury was as practicable as in any other kinds of legal controversies.

he can substantiate it on the trial of the same controversy at law by means of the examination of his opponent as a witness; and furthermore, he can examine on the trial at law all other persons whose testimony is material. In short, the plaintiff's allegations that he has a legal cause of action, and that he can sustain it by means of a discovery, made by the defendant, of facts within the latter's own knowledge, would, of necessity, show that he could maintain the same cause of action at law, by means of the testimony which the defendant could be compelled to give as a witness on the trial thereof in a court of law. It is true that the principle is well settled that when a court of equity had jurisdiction over a certain subject-matter, it does not lose such jurisdiction when courts of law have subsequently acquired the same jurisdiction. In my opinion, the matter under consideration does not come within the operation of this principle. It is not the case of a jurisdiction held by courts of equity which courts of law did not originally possess, but have now obtained. By the very assumption, the controversy, the cause of action, and the reliefs demanded are all *legal* in their nature; courts of law always had jurisdiction over them. The only difficulty was, that by reason of certain arbitrary rules of law concerning evidence, the jurisdiction of the law courts over this particular class of legal controversies could not be *exercised* so as to do full justice, until the defective legal rules of evidence had been aided or supplemented by means of a discovery in equity; when this discovery was once made, and the proper evidence was thereby obtained, the jurisdiction at law could then be exercised, and complete justice could be done by its trial and judgment, as much as in any other legal controversies. Since the particular equity doctrine under discussion arose, not from the *absence* of a jurisdiction at law, but merely from certain hindrances to its useful exercise, and since this doctrine depended for its existence and operation upon certain rules of evidence, it is not, in my opinion, embraced within the protection of the general principle as to jurisdiction quoted above; it seems to me to have been necessarily abrogated by the sweeping changes effected in the legal rules of evidence by modern statutes.[3]

SECTION III.

THE DOCTRINE THAT JURISDICTION EXISTING OVER SOME PORTION OR INCIDENT EXTENDS TO AND EMBRACES THE WHOLE SUBJECT-MATTER OR CONTROVERSY.

ANALYSIS.

§ 231. The doctrine as applied in the concurrent jurisdiction.
§ 232. As applied in the exclusive jurisdiction.
§ 233. Limitations on the doctrine.
§§ 234–241. Illustrations of the doctrine.
§ 234. In cases of discovery.
§ 235. In cases of administration.
§ 236. In cases of injunction.
§ 237. In cases of waste, nuisance, damages.
§§ 238–241. In various other cases.
§ 242. Effect of the reformed procedure on the doctrine.

§ 231. **As Applied to the Concurrent Jurisdiction.**— The rule has already been stated, as one of the foundations of the concurrent jurisdiction, that where a court of equity has obtained jurisdiction over some portion or feature of a controversy, it may, and will in general, proceed to decide the whole issues, and to award complete relief, although the rights of the parties are strictly legal, and the final remedy granted is of the kind which might be conferred by a court of law.[1] [a] This principle is, however, of much wider application, extending in its operation to both the concurrent and the exclusive jurisdictions; and it requires, therefore, a more full discussion. In its application to the concurrent jurisdiction, this principle forms, as has been already shown, one of the very foundations upon which that jurisdiction sometimes rests; and it is then something more than merely an occasion or condition of fact for the proper exercise of the jurisdiction. In other words, where the primary rights and cause of action of the complaining party are legal, and the remedy which he asks and obtains is of the kind given by courts of law, the concurrent jurisdiction of equity to interfere and adjudicate upon the controversy may exist by virtue of this principle; it may alone determine the inadequacy of legal remedies upon which the very existence of the concurrent jurisdiction always depends. It may be remarked that the instances in which the concurrent jurisdiction results from the operation of this principle, at least in the United States, are most frequently cases of accounting or of discovery followed by relief.[2] [b]

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[3] Miller v. Scammon, 52 N. H. 609, 610, which fully supports these conclusions.[b] It is true that it has been held in some states that the jurisdiction of equity to entertain "bills of discovery," properly so called, has not been abrogated by the legislation in question. But assuming that these decisions are correct, they do not, as it seems to me, determine the present question. Equity had a well-settled, independent jurisdiction to entertain "bills for discovery," technically so called. This jurisdiction had existed from the earliest periods of the English court of chancery; it was exclusive; the law courts had no such power. Even the modern legislation has not conferred upon the law courts a jurisdiction to entertain any such suits, but has only removed the disabilities which prevented parties and

(b) See also § 302.

§ 232. **As Applied in the Exclusive Jurisdiction.**— The principle is also frequently applied in cases belonging to the ex-

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other persons from testifying on trials of actions. It may well, then, be argued, and perhaps held, that a particular jurisdiction which had belonged to chancery courts from their earliest periods had not been impliedly abolished by statutes whose only express object was to alter certain rules of evidence. The doctrine discussed in the text, on the other hand, has no foundation nor existence, except as a special result of those ancient rules of evidence which the statute has changed. Deduced as a direct consequence from those prohibitory rules, it must, as it seems to me, fall with them.

[1] See *ante*, § 181.

[2] See cases cited *ante*, under § 181.

(a) Quoted in Carmichael v. Adams, 91 Ind. 526. Cited in Field v. Holzman, 93 Ind. 205; Freer v. Davis, 52 W. Va. 1, 43 S. E. 164, 94 Am. St. Rep. 895 (dissenting opinion); Collier v. Collier (N. J. Eq.), 33 Atl. 193.

(b) Quoted in Kansas City N. W. R. R. Co. v. Caton, 9 Kan. App. 272, 60 Pac. 544.

clusive jurisdiction, and it then furnishes an occasion for the proper exercise of that jurisdiction by the granting of complete final relief which is purely equitable in its nature. In such instances, where the primary rights and interests of the complaining party are legal, and the court has jurisdiction over some part of the controversy, or to grant some partial or incidental equitable relief, it may, under the operation of this principle, and generally will, go on and decide all the issues, and award the final equitable relief which is necessary to meet the ends of justice, and which belongs to the exclusive jurisdiction of the court.[1] While, therefore, the same general doctrine, expressed in the same formula, is equally applicable to cases of the concurrent and of the exclusive jurisdiction, yet its operation, as furnishing a ground for the judicial action, is very different in the two jurisdictions.

§ 233. **Limitations.**— This principle is not, however, universal in its application, either to the concurrent or to the exclusive jurisdiction. The following is an illustration of the limitation: A statute of Mississippi gave special power to the court of chancery to entertain suits to remove a cloud from title of land, where, after the cloud was removed, all the right and estate of the parties would be strictly legal, and the further remedies of the plaintiff would be such as are always obtainable by an action of ejectment, or an action for use and occupation.[1] It has been held that in an equitable suit brought under this statute, in order to remove a cloud, the court did not obtain jurisdiction to go on and decide conflicting claims to the purely legal estate in the land, or award possession, or a recovery of rents and profits, all of which belonged to the cognizance of a court of law in an action of ejectment.[2] From these cases, the rule would seem to result, that wherever a special power, not existing as a part of the general jurisdiction, is conferred by statute to grant some particular, specified, equitable remedy, the exercise of this statutory power, in a suit brought for that purpose, does not draw after it the additional power to decide the remaining portions of a controversy which are purely legal, and to determine rights and award remedies which belong specially to the cognizance of the law courts,—such, for example, as conflicting legal titles to tracts of land, and recovery of possession, or of rents and profits.[a]

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[1] Jesus College v. Bloom, 3 Atk. 262, 263, Amb. 54; Yates v. Hambly, 2 Atk. 237, 360; Ryle v. Haggie, 1 Jacob & W. 234, 237; Corp'n of Carlisle v. Wilson, 13 Ves. 276, 278, 279; Adley v. Whitstable Co., 17 Ves. 315, 324; McKenzie v. Johnston, 4 Madd. 373; Rathbone v. Warren, 10 Johns. 587, 596; King v. Baldwin, 17 Johns. 384, 8 Am. Dec. 415; Cornelius v. Morrow, 12 Heisk. 630; Farrar v. Payne, 73 Ill. 82, 91; Pratt v. Northam, 5 Mason, 95, 105; Thompson v. Brown, 4 Johns. Ch. 619, 631–643; Walker v. Morris, 14 Ga. 323, 325; Handley's Ex'r v. Fitzhugh, 1 A. K. Marsh. 24; Keeton v. Spradling, 13 Mo. 321, 323; State of Mo. v. McKay, 43 Mo. 594, 598; Souder's Appeal, 57 Pa. St. 498, 502; Sanborn v. Kittredge, 20 Vt. 632, 636, 50 Am. Dec. 58; Zetelle v. Myers, 19 Gratt. 62, 67; Ferguson v. Waters, 3 Bibb, 303; Middletown B'k v. Russ, 3 Conn. 135, 140, 8 Am. Dec. 164; Isham v. Gilbert, 3 Am. Dec. 166, 170, 171; Armstrong v. Gilchrist, 2 Johns. Cas. 424, 430, 431; Hawley v. Cramer, 4 Cow. 717; Oelrichs v. Spain, 15 Wall. 211, 228; Clarke v. White, 12 Pet. 178, 187, 188; Hepburn v. Dunlop, 1 Wheat. 179, 197; Phelps v. Harris, 51 Miss. 789, 794; Ezelle v. Parker, 41 Miss. 520, 526, 527.

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[1] Miss. Rev. Code, p. 541, art. 8.

[2] Phelps v. Harris, 51 Miss. 789, 794; Ezelle v. Parker, 41 Miss. 520, 526, 527. In the former of these cases, after stating the objects of such suits, and what the plaintiff must show, and that under form of such suits a court of equity cannot assume jurisdiction to try mere conflicting legal titles to land, Peyton, C. J., says (p. 794): "Hence the jurisdiction to remove clouds, doubts, and suspicions from over the title of the rightful owner of real estate *conferred by the statute upon the court of chancery*, does not, as an incident to it, authorize that court to take jurisdiction of the whole controversy in relation to the title to the land, the right of possession, the rents, issues, and profits, and thus usurp the jurisdiction belonging to the courts of law." In Ezelle v. Parker, 41 Miss. 520, Mrs. Parker, a married woman, had, by her own separate deed, in which her husband did not join, conveyed land owned by her to Ezelle, who had paid for it in confederate money, and was in possession. Mrs. P. and her husband sued in equity to cancel such deed as a cloud upon Mrs. P.'s title, and to recover possession of the land, and for an

[a] The principle appears to be much more sparingly applied by the courts of New Jersey than by the courts of other states; thus, it is stated that "a court of chancery in this state has never adopted the principle that, because its jurisdiction has once rightfully attached, it will retain the cause as a matter of right, for the purpose of complete relief." Brown v. Edsall, 9 N. J. Eq. 257; Lodor v. McGovern, 48 N. J. Eq. 275, 27 Am. St. Rep. 446, 22 Atl. 199; Collier v. Collier (N. J. Eq.), 33 Atl. 193.

§ 234. **Illustrations.**— In order to illustrate the operation of the general principle, and to show the variety and extent of the cases in which it has been applied, I add a considerable number of examples, most of which are taken from American decisions. Where a plaintiff has demanded and obtained a discovery under the circumstances described in preceding paragraphs, it is well settled that the court will go on and decide the whole controversy and grant final relief in cases involving fraud or mistake, and in those where the relief consists in an accounting and payment or distribution, if the case possesses some equitable incident or feature which *might* have brought it within either branch of the equitable jurisdiction, independent of the fact of a discovery.[1] How far some American courts have gone beyond this limit, and have assumed to apply the principle and to decide all the issues, *after a discovery,* in cases possessing no other equitable feature or incident, has already been fully described.[2] The particular remedy of a discovery is also, to some extent at least, the foundation of the established jurisdiction of equity over the administration of the personal estates of deceased persons. It has frequently been held that where a creditor, or a legatee, or a distributee brought a suit in equity to obtain a discovery of assets in the hands of the personal representatives, the court, having thus obtained a jurisdiction of the matter for this special purpose, would go on and make a full decree of administra-

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account of the rents and profits. Held, that the court would set aside the deed as a cloud, but could not go on and decree a recovery of possession and payment of the rents and profits. The latter relief could be obtained only by an action at law.

[1] Handley's Ex'r v. Fitzhugh, 1 A. K. Marsh. 24; Sanborn v. Kittredge, 20 Vt. 632, 636, 50 Am. Dec. 58; Chichester's Ex'r v. Vass's Adm'r, 1 Munf. 98, 4 Am. Dec. 531; Furguson v. Waters, 3 Bibb, 303; Middletown Bk. v. Russ, 3 Conn. 135, 140, 8 Am. Dec. 164; Isham v. Gilbert, 3 Conn. 166, 170, 171; Armstrong v. Gilchrist, 2 Johns. Cas. 424, 430, 431; Hawley v. Cramer, 4 Cow. 717, 728; but see Little v. Cooper, 10 N. J. Eq. 273, 275; Brown v. Edsall, 9 N. J. Eq. 256. And see *ante,* §§ 224–226.

[2] See *ante,* §§ 227–229.

tion, of accounting from the executors or administrators, and of final settlement and distribution.[3] [a]

§ 235. Although the legislation of most of the states has either expressly or practically taken the general jurisdiction of administration from the courts of equity, and has conferred it upon courts of probate under minute statutory regulation, still, whenever a court of equity takes cognizance of a decedent's estate for any special purpose, or to grant any special relief not within the power of the probate court, such as the construction of a will, the setting aside of some fraudulent transaction of an executor or administrator, the restraining of an executor's or administrator's wrongful acts by injunction, and the like, it has been held in many states that the court of equity, having thus acquired a jurisdiction of the estate for this particular purpose, may and should, notwithstanding the statutory system, go on and decree a complete administration, settlement, and distribution of the entire estate, in the same manner in which it would have proceeded under the original jurisdiction of chancery prior to the legislation.[1][a] In some of the states this power of a court of equity to go on and control the entire administration of the estate and decree a final settlement and distribution, whenever it has thus obtained a jurisdiction for some special purpose, is doubtless limited or prohibited by the statutes. The language of the statute conferring general power over the whole subject of administration upon the probate court is so broad, minute, and peremptory that the general powers and jurisdiction originally belonging to chancery over the settlement of decedents' estates are completely taken away, and are wholly transferred into the exclusive cognizance of the probate court, and are exercised by it in accordance with the minute and compulsory provisions of a statutory system. In these states, and by virtue of these statutes, if a court of equity obtains jurisdiction over the subject-matter of a decedent's estate for any special purpose not within the competency of the probate court, such as the construction of a will, the control and enforcement of a trust, the cancellation of some fraudulent conveyance made by an executor or administrator, and the like, its functions will be limited to matters which are necessary to render this special relief complete and effectual; it will not be allowed to go on to a full and final administration and settlement of the estate as a whole. Such administration and settlement, after receiving the aid of the special relief furnished by the decree in equity, can be accomplished by the probate court alone, to whose exclusive cognizance they have been intrusted by the statute.[2]

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[3] Pratt v. Northam, 5 Mason, 95, 105; Yates v. Hambly, 2 Atk. 237, 360; Jesus College v. Bloom, 3 Atk. 262, 263, per Lord Hardwicke; Thompson v. Brown, 4 Johns. Ch. 619, 631, 643; Pearson v. Darrington, 21 Ala. 169; Walker v. Morris, 14 Ga. 323, 325; Martin v. Tidwell, 36 Ga. 332, 345; Keeton v. Spradling, 13 Mo. 321, 323; Gilliam v. Chancellor, 43 Miss. 437, 448, 5 Am. Rep. 498. In Pratt v. Northam, 5 Mason, 95, Story, J., held that the United States circuit court, as a court of equity, has jurisdiction in a suit by a legatee or distributee against an executor or administrator for an administration and settlement of the estate, under the established general authority of chancery, notwithstanding any local state legislation on the subject. As to the origin of this jurisdiction of chancery, he said (page 105): "The original ground seems to have been that a creditor, or other party in interest, had a right to come into chancery for a discovery of assets, and being once rightfully there, he should not be turned over to a suit at law for final redress. For purposes of complete justice, it became necessary to conduct the whole administration and distribution of assets under the superintendence of the court of chancery, when it once interfered to grant relief in such cases."

(a) The text is cited in Sanders v. Soutter, 126 N. Y. 193, 27 N. E. 263.

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[1] Cowles v. Pollard, 51 Ala. 445, 447; Youmans v. Youmans, 26 N. J. Eq. 149, 154; Pearson v. Darrington, 21 Ala. 169; Walker v. Morris, 14 Ga. 323, 325; Martin v. Tidwell, 36 Ga. 332, 345; Keeton v. Spradling, 13 Mo. 321, 323; Gilliam v. Chancellor, 43 Miss. 437, 448, 5 Am. Rep. 498. Cowles v. Pollard, 51 Ala. 445, is a very important case in its bearing upon the statutory system which exists in many states. Peters, C. J., said (p. 447): "It is now well settled in this state that when the trusts of a will are doubtful, or the personal representative may have difficulty or be embarrassed in the execution of such trusts, a court of equity will at his instance take jurisdiction to construe the will, and to aid and direct the executor or administrator in the performance of his duties: Sellers v. Sellers, 35 Ala. 235; Trotter v. Blocker, 6 Port. 269. And when a court of chancery once takes jurisdiction on any ground of equitable interposition, the cause will be retained, and the administration will be conducted and finally settled in that court: Stewart v. Stewart, 31 Ala. 207; Wilson v. Crook, 17 Ala. 59; Hunley v. Hunley, 15 Ala. 91. In such a suit the chancellor will apply the law regulating the conduct and settlement of administrations in the court of probate, but he will proceed according to the rules and practice of a court of equity: Hall v. Wilson, 14 Ala. 295; Taliaferro v. Brown, 11 Ala. 702." In Youmans v. Youmans, 26 N. J. Eq. 149, 154, it was also held that, in a suit to construe a will and for directions to the executor, all parties interested being joined, the court would go on and adjust and finally settle the accounts of the executor; citing Mallory v. Craige, 15 N. J. Eq. 73. In Keeton v. Sprad-

(a) The text is cited and followed in Sanders v. Soutter, 126 N. Y. 193, 27 N. E. 263. It was there held that a surrogate's court has no power to annul or set aside, on the ground of fraud, a release executed by parties interested in an estate to the executors thereof; that such relief may and can only be obtained from a court of equity; and that in an action brought for such purpose the court, in the exercise of its concurrent jurisdiction with the surrogate's court, may grant full relief, and decree an accounting by executors, and a settlement and distribution of the estate.

§ 236. Another extensive class of cases in which the principle has been applied embraces suits brought to enjoin the further prosecution of a pending action at law, or the en-

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ling, 13 Mo. 321, 323, the suit was brought by next of kin to set aside a decree of the court of probate obtained by the administrator through fraud, and the court held that having obtained jurisdiction for this particular purpose, it would go on and give full relief by a final decree for an accounting by the administrator, settlement of the estate, and distribution of the assets. Gilliam v. Chancellor, 43 Miss. 437, 448, 5 Am. Rep. 498, is also a very important decision respecting the equity powers under the legislation concerning administration. It holds that the jurisdiction given by the Mississippi statutes to the probate court is exclusive, and the court of chancery is thereby deprived of its original general jurisdiction over administration; citing Blanton v. King, 2 How. (Miss.) 856; Carmichael v. Browder, 3 How. (Miss.) 252. But where, as in this case, a widow claimed under an antenuptial contract with her husband, and also a legacy given by his will, and the executor insisted that the legacy was in satisfaction of the antenuptial portion, the court held that equity had exclusive jurisdiction to decide the widow's rights under the antenuptial agreement; and thus having jurisdiction over a portion of the controversy, the court would decide all the matters in issue between her and the executor growing out of the will, and would enjoin an action brought by her in the probate court to recover the legacy, and would determine all her rights and claims under the will and under the nuptial contract in the one equity suit. The other cases cited above all maintain the doctrine stated in the text.

[2] Gilliam v. Chancellor, 43 Miss. 437, 448, 5 Am. Rep. 498, and cases cited. This seems to be the system prevailing in a considerable number of states.

forcement of a judgment recovered at law, either on the ground of some equitable defense not cognizable by the law court, or on the ground of some fraud, mistake, ignorance, or other incident of the trial at law, which rendered the legal judgment inequitable. In such cases the court of equity, having obtained jurisdiction of the cause for the purpose of an injunction, may decide the whole controversy and render a final decree, even though all the issues are legal in their nature, capable of being tried by a court of law, and the legal remedies therefor are adequate.[1][a] In fact, the rule is more general still in its operation, and extends to all suits brought to obtain the special relief of injunction, and is not confined to suits for the purpose of enjoining actions or judgments at law. It may be stated as a general proposition, that wherever the court of equity has jurisdiction to grant the remedy of injunction for some special purpose, even though the injunction covers only a portion of the controversy, it may go on and decide all the issues, and make a final decree granting full relief.[2] [b]

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[1] Cornelius v. Morrow, 12 Heisk. 630; Mays v. Taylor, 7 Ga. 238, 243, 244; Rust v. Ware, 6 Gratt. 50, 52 Am. Dec. 100; Billups v. Sears, 5 Gratt. 31, 37, 38, 50 Am. Dec. 105; Parker v. Kelly, 10 Smedes & M. 184; Oelrichs v. Spain, 15 Wall. 211, 228. In the very recent case of Cornelius v. Morrow, 12 Heisk. 630, which was a suit to enjoin a judgment recovered at law by default, on a note, it was held that where defendant at law has a legal defense available at law, but not free from difficulty in its establishment, and a second defense wholly equitable, he may resort to equity at once, enjoin the action or judgment at law, and have all the issues tried in the equity suit. In Mays v. Taylor, 7 Ga. 238, 243, 244, which was a suit to enjoin a judgment at law and the execution thereon, on the ground that the judgment creditor had violated an agreement made with the complainant (the judgment debtor) concerning the issuing of an execution and the enforcement of the judgment, the court held that the complainant could have had an adequate remedy at law by an action for damages for the breach of such agreement, but still, as equity had jurisdiction for the purpose of enjoining the execution, the court would retain and decide the whole cause, and grant full relief to the complainant. It therefore decreed that defendant should repay all the

(a) Cited in Coons v. Coons, 95 Va. 434, 28 S. E. 885, 64 Am. St. Rep. 804; United States Min. Co. v. Lawson, 115 Fed. 1005. §§ 236–240 are cited in Hagen v. Lyndonville Nat. Bk., 70 Vt. 543, 556, 67 Am. St. Rep. 680, 689, 41 Atl. 1046, 1051. See also Ducktown, S. C. & S. Co. v. Barnes (Tenn.), 60 S. W. 593; W. V. Davidson Lumber Co. v. Jones (Tenn. Ch. App.), 62 S. W. 386; Hickman v. White (Tex. Civ. App.), 29 S. W. 692. In Gulf, C. & S. F. R. R. Co. v. Schneider (Tex. Civ. App.), 28 S. W. 260, an injunction was issued against the enforcement of a judgment of a justice of the peace, but the court retained the case to try the original cause of action, although the amount involved was less than the limit of jurisdiction. In Coons v. Coons, 95 Va. 434, 64 Am. St. Rep. 804, 28 S. E. 885, it was held that a bill to enjoin an award of arbitrators may be retained for legal relief. Bills to enjoin execution sales and writs of possession have been retained for full relief. Probert v. McDonald, 2 S. D. 495, 51 N. W. 212, 39 Am. St. Rep. 796; Leighton v. Young, 52 Fed. 439, 3 C. C. A. 176, 10 U. S. App. 298, 18 L. R. A. 266.

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money which had been collected on the execution in violation of the agreement. In Rust v. Ware, 6 Gratt. 50, 52 Am. Dec. 100, which was a suit to enjoin a judgment at law on ground of a palpable mistake by the jury and newly discovered evidence, it was held that as the court had a jurisdiction to enjoin the judgment, it would retain and decide the whole cause on the merits, and not send it back for a new trial at law. In Billups v. Sears, 5 Gratt. 31, 37, 38, 50 Am. Dec. 105, the facts were similar and the ruling the same.

[2] People v. Chicago, 53 Ill. 424, 428; Armstrong v. Gilchrist, 2 Johns. Cas. 424, 430, 431; Jesus College v. Bloom, 3 Atk. 262, 263, per Lord Hardwicke. People v. Chicago, 53 Ill. 424, 428, is a strong case. A statute required that all the proceedings of the city common council should be published in the German newspaper having the largest circulation. The common council designated a certain German newspaper. The owners of another paper claimed to be entitled, and brought a suit in chancery against the city officers and the designated paper, praying an injunction and general relief. The court held "that while there may be grave doubts whether a court of equity would take jurisdiction for the mere purpose of compelling the proper execution of the statute in question on the part of the common council, yet, having acquired jurisdiction for a purpose clearly within the province of a court of chancery,— that of awarding an injunction,— it may retain the bill for the purpose of ascertaining and enforcing all the rights of the parties properly involved in the subject-matter of the controversy." In Armstrong v. Gilchrist, 2 Johns. Cas. 424, 430, 431, the general doctrine was thus stated by Radcliffe, J., and Kent, C. J. (pp. 430, 431): "The court of chancery, having

(b) Cited in Danielson v. Gude, 11 Colo. 87, 17 Pac. 283; Richi v. Chattanooga Brewing Co., 105 Tenn. 651, 58 S. W. 646; quoted, Freer v. Davis, 52 W. Va. 1, 59 L. R. A. 556, 43 S. E. 164, 94 Am. St. Rep. 895 (dissenting opinion). See also National Dock & N. J. J. C. R. R. Co. v. Penn. R'y Co., 54 N. J. Eq. 10, 33 Atl. 219; Gaffey v. Northwestern Mut. Life Ins. Co. (Nebr.), 98 N. W. 826; Getheil Park Inv. Co. v. Town of Montclair (Colo.), 76 Pac. 1050; Bessemer Irr. Ditch Co. v. Woolley (Colo.), 76 Pac. 1053. But see Graeff v. Felix, 200 Pa. St. 137, 49 Atl. 758, where complainant sought to enjoin parties claiming to be water commissioners from purchasing land on the ground that they were no longer in office. The court held that the main purpose of the bill was to try title to

§ 237. Particular instances of the operation of the above general rule concerning the remedy of injunction may be seen in the cases of waste and of private nuisance. Originally the jurisdiction over cases of waste was confined to courts of law; the legal remedy by action for damages was regarded as adequate, and as the only remedy. The same was true of private nuisance. In time it was felt that this merely compensatory relief was insufficient under some circumstances, and that a preventive remedy was necessary to the ends of justice. Equity therefore assumed a jurisdiction to grant an injunction restraining the commission of actual or threatened waste; and having obtained jurisdiction for the purpose of awarding this special relief, which, in many instances, is not complete, the court will retain the cause, and decree full and final relief, including damages, and when necessary, an abatement of whatever creates the waste or causes the nuisance.[1][a] The same description will

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acquired cognizance of the suit for the purpose of discovery *or injunction*, will, in most cases of account, whenever it is in full possession of the merits, and has sufficient materials before it, retain the suit, in order to do full justice between the parties, and to prevent useless litigation and expense." In the well-known case of Jesus College v. Bloom, 3 Atk. 262, 263, Lord Hardwicke, speaking of the principle under discussion, said: "So in bills for an injunction, the court will make a complete decree, and give the party a satisfaction, and not oblige him to bring an action at law as well as a bill here."

[1] Jesus College v. Bloom, 3 Atk. 262, 263. This was a suit for an account of waste and payment of whatever was found due, no injunction being asked

office, and that it would not take jurisdiction. "It is quite true, as held by the learned judge below, that equity, having acquired jurisdiction of a case, may decide all matters incidentally connected with it, so as to make a final determination of the whole subject; but this rule does not extend to a case where only some incidental matter is of equitable cognizance, and thereby enable the court to draw in a main subject of controversy which has a distinct and appropriate legal remedy of its own. That is the present case. The only subject of equitable cognizance in the case is found in the contemplated purchase, which is a mere incident to the main purpose of the bill, and is only pleaded inferentially." And for a similar instance, see Broadis v. Broadis, 86 Fed. 951, citing text, §§ 231-242.

(a) This section is cited generally in Robinson v. Appleton, 124 Ill. 276, 15 N. E. 761; In re Leeds Woolen Mills, 129 Fed. 922.

Injunction against Trespass and Waste; Retaining Jurisdiction for Damages, etc.—"Where a bill shows apply to all cases of private nuisance in which a court of equity may have jurisdiction to interfere by injunction.[2] [b] There are some other instances, in addition to those of injunction, waste, nuisance, and continuous or irreparable trespass, where equity, having obtained jurisdiction for

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for. Held, that the suit could not be maintained unless an injunction was prayed. Lord Hardwicke said (p. 263): "The ground of coming into this court is to *stay* waste, and not for the satisfaction for the damages, but for a prevention of the wrong, which courts of law cannot do in those instances where a writ of prohibition of waste will not be granted. But in all these cases the court has gone further, mainly upon the maxim of preventing a multiplicity of suits, which is the reason that determines this court in many cases."

[2] Additional instances of nuisance and of waste will be found in the next subsequent section on preventing a multiplicity of suits.

cause for equitable relief by injunction to stay destructive and continuous trespass in the nature of waste, the court will decree an account and satisfaction for the injuries already done." U. S. v. Guglard, 79 Fed. 21, citing text, §§ 231–237. See also Peck v. Ayers & Lord Tie Co., 53 C. C. A. 551, 116 Fed. 273, where the court retained the bill to try title. The principle applies to suits to enjoin continuing trespasses. Brown v. Solary, 37 Fla. 102, 19 South. 161; Watson v. Watson, 45 W. Va. 290, 31 S. E. 939. But it has been held that while the legislature may authorize an injunction against simple acts of trespass, it cannot authorize the assessment of damages in actions to enjoin such acts of trespass which would not have come within the cognizance of chancery courts independently of statute. Wiggins v. Williams, 36 Fla. 637, 18 South. 859, 30 L. R. A. 754; McMillan v. Wiley (Fla.), 33 South. 992. The question of retaining jurisdiction to award damages in cases of injunction against continuing trespass is carefully examined in Lynch v. Metropolitan El. R'y Co., 129 N. Y. 274, 15 L. R. A. 287, 26 Am. St. Rep. 523, 29 N. E. 315, where it is held that the amount of such damages does not present an issue upon which the parties are entitled to a trial by jury; citing Williams v. New York Cent. R. R. Co., 16 N. Y. 97, 69 Am. Dec. 651; Henderson v. New York Cent. R. R. Co., 78 N. Y. 423; Shepard v. Manhattan R'y Co., 117 N. Y. 442, 23 N. E. 30, and other cases. In Whipple v. Village of Fair Haven, 63 Vt. 221, 21 Atl. 533, the court took jurisdiction to enjoin a town from draining on to complainant's land, and then retained the bill to award damages.

In Parker v. Shannon, 114 Ill. 192, 28 N. E. 1099, it was held, however, that chancery will not try the title to land, on having acquired jurisdiction, merely to enjoin waste temporarily while the legal title is in dispute. To the same effect, see Freer v. Davis, 52 W. Va. 1, 43 S. E. 164, 94 Am. St. Rep. 895, 59 L. R. A. 556.

(b) Cited to this effect in Fleishner v. Citizens' R. E. & I. Co., 25 Oreg. 119, 35 Pac. 174; Morris v. Bean, 123 Fed. 618 (suit to restrain diversion of water); Richi v. Chattanooga Brewing Co., 105 Tenn. 651, 58 S. W. 646.

some particular purpose, will complete the possible relief by decreeing damages; but this application of the principle is not general; on the contrary, it is rather exceptional. The award of mere compensatory damages, which are almost always unliquidated, is a remedy peculiarly belonging to the province of the law courts, requiring the aid of a jury in their assessment, and inappropriate to the judicial position and functions of a chancellor. It may be stated, therefore, as a general proposition, that a court of equity declines the jurisdiction to grant mere compensatory damages, when they are not given in addition to or as an incident of some other special equitable relief, unless under special circumstances the exercise of such jurisdiction may be requisite to promote the ends of justice.[c] There are, how-

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(c) **Damages, without Other Relief, rarely Awarded.**— Accordingly, except in the instances stated below in the text and notes, a case will not be retained when no right to equitable relief is made out. "If such a procedure could be tolerated, a party having an action maintainable at law, but which he would prefer not to have presented to the consideration of a jury, could quite frequently so frame his pleadings as to entitled him to go to trial before the court on its equity side, and then claim the right to have the court award the damages in violation of the constitutional guaranty of a right of trial by jury." Green v. Stewart, 45 N. Y. Supp. 982, 19 App. Div. 201. Thus, "when an action at law is sought to be restrained by suit in equity, and part of the grounds on which the bill rests are purely of equitable cognizance, and part, when considered separately, are strictly of legal cognizance, and the proofs do not establish the allegations which are of purely equitable cognizance, a court of equity has not jurisdiction to further restrain the action at law, and proceed to determine the legal rights of the parties." Collier v. Collier (N. J. Eq.), 33 Atl. 193. See also Dugan v. Cureton, 1 Ark. (1 Pike) 31, 31 Am. Dec. 727; Roddy v. Cox, 29 Ga. 298, 74 Am. Dec. 64. In Crowell v. Young (Ind. T.), 64 S. W. 607, it was held that a money judgment cannot be given upon a bill for foreclosure when the right to equitable relief is not made out. In Bittenbender v. Bittenbender, 185 Pa. St. 135, 39 Atl. 838, the complainant failed in a bill to annul a contract for the dissolution of a partnership. It was held that the bill would not be retained for the purpose of working out the equities under the contract. In Toplitz v. Bauer, 49 N. Y. Supp. 840, 26 App. Div. 125, the court refused to set aside an assignment of an insurance policy for fraud. It was held that the bill should not be retained to award damages. On the general principle, see also Alger v. Anderson, 92 Fed. 696, and cases there reviewed; Kinsey v. Bennett, 37 S. C. 319, 15 S. E. 965; Boston Blower Co. v. Carman Lumber Co., 94 Va. 94, 26 S. E. 390; Hawes v.

ever, special circumstances in which the principle under discussion is invoked and is extended to the award of mere damages. If a court of equity obtains jurisdiction of a suit for the purpose of granting some distinctively equitable relief, such, for example, as the specific performance of a contract, or the recission or cancellation of some instrument, and it appears from facts disclosed on the hearing, but not known to the plaintiff when he brought his suit, that the special relief prayed for has become impracticable, and the plaintiff is entitled to the only alternative relief possible of damages, the court then may, and generally will, instead of compelling the plaintiff to incur the double expense and trouble of an action at law, retain the cause, decide all the issues involved, and decree the payment of mere compensatory damages.[3] [d]

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[3] Holland v. Anderson, 38 Mo. 55, 58; Wiswall v. McGovern, 2 Barb. 270; Cuff v. Dorland, 56 Barb. 481. Holland v. Anderson, 38 Mo. 55, was a suit by the vendee to cancel a contract for the sale of land, on the ground of the vendor's fraud. A rescission was found to be impossible, because the property had been changed, and the parties could not be restored to their original condition. The general doctrine was stated that "a court of equity will sometimes give damages, which are generally only recoverable at law, in lieu of equitable relief, when it has obtained jurisdiction on other grounds." The application of the principle to the relief of damages has frequently occurred in suits for a specific performance. The following rules have been established

Dobbs, 18 N. Y. Supp. 123; Whyte v. Builders League, 54 N. Y. Supp. 822, 35 App. Div. 480; Vincent v. Moriarty, 52 N. Y. Supp. 519; Dowell v. Mitchell, 105 U. S. 430; Lamb Knit Goods Co. v. Lamb, 119 Mich. 568, 78 N. W. 646; Miller v. St. Louis & K. C. R. Co., 162 Mo. 424, 63 S. W. 85; Gamage v. Harris, 79 Me. 531, 11 Atl. 422; Ahl's Appeal, 129 Pa. St. 49, 18 Atl. 475, 477; Kerlin v. Knipp, 207 Pa. St. 649, 57 Atl. 34.

(d) Cited with approval in Blair v. Smith, 114 Ind. 114, 15 N. E. 817, 5 Am. St. Rep. 593; Martin v. Martin, 44 Kan. 295, 24 Pac. 418; Van Dusen v. Bigelow (N. Dak.), 100 N. W. 723 (damages as alternative relief to cancellation and reconveyance); quoted in Cole v. Getzinger, 96 Wis. 559, 71 N. W. 75. See also Van Rensselaer v. Van Rensselaer, 113 N. Y. 208, 21 N. E. 75. In the author's note are rules as to specific performance. The text is applicable to other actions. Thus, in Bigelow v. Town of Washburn, 98 Wis. 553, 74 N. W. 362, a suit was brought to enjoin the collection of a tax. Pending the suit, an officer levied on the property, and to prevent a sale the tax was paid. It was held that the court would retain the case for complete relief. In Moon v. National Wall-Paper Co., 66 N. Y. Supp. 33, 31 Misc. Rep. 631, the complainant sued to abate

§ 238. The extent and operation of the general principle are also illustrated by the following instances, which do not admit of any regular classification: In a suit to redeem land sold under a trust deed made by a former owner, on

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by American decisions: If through a failure of the vendor's title, or any other cause, a specific performance is really impossible, and the vendee is aware of the true condition of affairs before and at the time he brings his suit, the court, being of necessity obliged to refuse the remedy of specific performance, will not, in general, retain the suit and award compensatory damages, because, as has been said, the court never acquired a jurisdiction over the cause for *any* purpose:[e] Hatch v. Cobb, 4 Johns. Ch. 559; Kempshall v. Stone, 5 Johns. Ch. 194; Morss v. Elmendorf, 11 Paige, 277; Smith v. Kelley, 56 Me. 64; McQueen v. Chouteau, 20 Mo. 222, 64 Am. Dec. 178; Doan v. Mauzey, 33 Ill. 227; Gupton v. Gupton, 47 Mo. 37; Milkman v. Ordway, 106 Mass. 232, 253; Sternberger v. McGovern, 56 N. Y. 12, 20; and see also cases next cited. A second rule is, that if the remedy of specific performance is possible at the commencement of a suit by the vendee, and while the action is pending the vendor renders this remedy impracticable by conveying the subject-matter to a *bona fide* purchaser for value, the court

a nuisance which was voluntarily abated after the suit was commenced, and the court retained the case for the purpose of awarding damages. In Lewis v. Town of Kingston, 16 R. I. 15, 11 Atl. 173, 27 Am. St. Rep. 724, complainant sought to enjoin a town from removing his building and grading his lot. The town completed the work after the filing of the bill, and the court retained jurisdiction to give damages. In Case v. Minot, 158 Mass. 577, 22 L. R. A. 536, 33 N. E. 700, a tenant sued his landlord to enjoin a nuisance. The right to the injunction was lost because of the termination of the lease before the hearing. It was held that the suit should be retained for the purpose of awarding damages. In general, whenever a court of equity has jurisdiction to entertain a bill for an injunction against the commission or continuance of a wrongful act, it may award damages in substitution for such injunction, where the defendant by his acts committed subsequent to the service of process upon him has rendered relief by injunction ineffectual. Hazen v. Lyndonville Nat. Bank, 70 Vt. 543, 556, 67 Am. St. Rep. 680, 689, 41 Atl. 1046, 1051, citing the text; Lewis v. Town of North Kingston, 16 R. I. 15, 26 Am. St. Rep. 724, 11 Atl. 173; Hayden v. Yale, 45 La. Ann. 362, 40 Am. St. Rep. 232, 12 South. 633; Westphal v. City of New York, 177 N. Y. 140, 69 N. E. 369.

See also Stiefel v. New York Novelty Co., 43 N. Y. Supp. 1012, 14 App. Div. 371; Atkinson v. Felder, 78 Miss. 83, 29 South. 767; Robinson v. Braiden, 44 W. Va. 183, 28 S. E. 798; State v. Sunapee Dam Co. (N. H.), 55 Atl. 899.

(e) See also Hurlbut v. Kantzler, 112 Ill. 482; Amick v. Ellis, 53 W. Va. 421, 44 S. E. 257 (contract on its face is unenforceable). If specific performance is refused because the contract is within the statute of frauds, damages will not be allowed the ground that the sale was voidable, brought by a plaintiff holding by a subsequent conveyance from such former owner, against a defendant deriving title partly from the trust sale and partly from another source, the court not only dismissed the plaintiff's bill, but by an affirmative

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will not compel the plaintiff to bring a second action at law, but having acquired jurisdiction, will do full justice by decreeing a recovery of damages:[f] Morss v. Elmendorf, 11 Paige, 277; Woodcock v. Bennet, 1 Cow. 711, 13 Am. Dec. 568; Milkman v. Ordway, 106 Mass. 232, 253, per Wells, J. The third rule is as follows: If a specific performance was originally possible, but *before the commencement of the suit* the vendor makes it impossible by a conveyance to a third person; or if the disability existed at the very time of entering into the contract on account of a defect in the vendor's title, or other similar reason,— in either of these cases, if the vendee brings his suit in good faith, without a knowledge of the existing disability, supposing, and having reason to suppose, himself entitled to the equitable remedy of a specific performance, and the impossibility is first disclosed by the defendant's answer or in the course of the hearing, then, although the court cannot grant a specific performance, it will retain the cause, assess the plaintiff's damages, and decree a pecuniary judgment in place of the purely equitable relief originally demanded. This rule is settled by an overwhelming preponderance of American authorities:[g] Milk-

for its breach: Lydick v. Holland, 83 Mo. 703; and see Lavery v. Pursell, L. R. 39 Ch. Div. 518.

(f) Cited to this effect in Head v. Meloney, 111 Pa. St. 99, 2 Atl. 195. See also Conemaugh Gas Co. v. Jackson Farm Gas Co., 186 Pa. St. 443, 65 Am. St. Rep. 865, 40 Atl. 1000. The rule applies where the contract is performed after commencement of suit. Grubb v. Sharkey, 90 Va. 831, 20 S. E. 784.

(g) In McAllister v. Harman, (Va.) 42 S. E. 920, a suit by the vendor, which failed, was retained for an account of money paid and rents received.

Another rule has been suggested in addition to those stated in the author's note. "Even though the court should deny a specific performance of the contract in the exercise of that judicial discretion which it has in all cases asking that particular relief, yet, if the facts be such that the plaintiff might fairly and reasonably have expected the court to grant the equitable relief of specific performance, there would be such a show of equitable cognizance and doubtful remedy and probable cause as would save the plaintiff from the penalty of a dismissal of the bill for want of jurisdiction because of a plain, adequate and complete remedy at law." Waite v. O'Neil, 72 Fed. 348; affirmed, 76 Fed. 408, 22 C. C. A. 248, 34 L. R. A. 550. In Aday v. Echols, 18 Ala. 353, 52 Am. Dec. 225, specific performance was refused because the contract was not clearly proved, but the bill was retained for damages. And see Goddard v. American Queen, 59 N. Y. Suppl. 46, 27 Misc. Rep. 482. In Combs v. Scott, 76 Wis. 662, 45 N. W. 532, the statute of limitations having run upon the contract pending suits for specific performance, the decree declared and established the defendant's title.[1] In a suit brought by the holder of a vendor's lien to enjoin the sale of land covered by the lien, about to be made by a judgment creditor of the owner, the court went on and decreed a sale of the land, and the application of its proceeds in satisfaction, first, of the plaintiff's vendor's lien, and then of

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man v. Ordway, 106 Mass. 232, 253; Chartier v. Marshall, 56 N. H. 478; Attorney-General v. Deerfield River Bridge Co., 105 Mass. 1; Peabody v. Tarbell, 2 Cush. 226; Andrews v. Brown, 3 Cush. 130; Pingree v. Coffin, 12 Gray, 288, 305; Woodcock v. Bennet, 1 Cow. 711, 13 Am. Dec. 568; Phillips v. Thompson, 1 Johns. Ch. 131; Parkhurst v. Van Cortlandt, 1 Johns. Ch. 273; Morss v. Elmendorf, 11 Paige, 277; Woodward v. Harris, 2 Barb. 439; Berry v. Van Winkle, 2 N. J. Eq. 269; Copper v. Wells, 1 N. J. Eq. 10; Rees v. Smith, 1 Ohio, 124, 13 Am. Dec. 599; Gibbs v. Champion, 3 Ohio, 335; Jones v. Shackelford, 2 Bibb, 410; Fisher v. Kay, 2 Bibb, 434; Rankin v. Maxwell, 2 A. K. Marsh. 488, 12 Am. Dec. 431; Hopkins v. Gilman, 22 Wis. 476; Tenney v. State Bank, 20 Wis. 152; Hall v. Delaplaine, 3 Wis. 206, 68 Am. Dec. 57; McQueen v. Chouteau, 20 Mo. 222, 64 Am. Dec. 178; O'Meara v. North Am. Min. Co., 2 Nev. 112; Carroll v. Wilson, 22 Ark. 32; Harrison v. Deramus, 33 Ala. 463; Foley v. Crow, 37 Md. 51; Stevenson v. Buxton, 37 Barb. 13; Hamilton v. Hamilton, 59 Mo. 232; Gupton v. Gupton, 47 Mo. 37, 47; Denton v. Stewart, 1 Cox, 258; Greenaway v. Adams, 12 Ves. 393. In the recent case of Milkman v. Ordway, 106 Mass. 232, 253, the opinion of Wells, J., is a very full, able, and instructive examination of the doctrine in all of its aspects. I add a number of English decisions, giving construction to the statute known as "Lord Cairns's Act" (21 & 22 Vict., chap. 27, § 1, A. D. 1858), which permits a court of equity to award damages in certain cases, instead of the particular equitable relief prayed for, when the latter is found to be impracticable: Wicks v. Hunt, Johns. 372, 380; Lewers v. Earl of Shaftesbury, L. R. 2 Eq. 270; Scott v. Rayment, L. R. 7 Eq. 112; Ferguson v. Wilson, L. R. 2 Ch. 77; Durell v. Pritchard, L. R. 1 Ch. 244; Rogers v. Challis, 27 Beav. 175; Chinnock v. Sainsbury, 30 L. J., N. S., 409; Collins v. Stubly, 7 Week. Rep. 710; Corporation of Hythe v. East, L. R. 1 Eq. 620; Middleton v. Greenwood, 2 De Gex, J. & S. 142; Soames v. Edge, John. 669; Lillie v. Legh, 3 De Gex & J. 204; De Brassac v. Martin, 11 Week. Rep. 1020; Cory v. Thames, etc., 11 Week. Rep. 589; Howe v. Hunt, 31 Beav. 420; Norris v. Jackson, 1 Johns. & H. 319, 3 Giff. 396; Samuda v. Lawford, 8 Jur., N. S., 739.

[1] Farrar v. Payne, 73 Ill. 82, 91.

cause was retained for the purpose of granting compensation.

Of course when the court takes jurisdiction of a bill for specific performance and the relief is granted, the bill will be retained for complete relief. Thus, where the bill seeks specific performance of a contract to deliver certain instruments, the court may decree specific performance and then award a money recovery on the instruments. Clarke v. White, 37 the judgment creditor's demand.[2] A suit being brought to reform a policy of insurance after a loss had occurred, the court retained the cause and gave the plaintiff final and complete relief by ordering a payment of the amount due on the policy as reformed, although the remedy would ordinarily and naturally have belonged to a court of law.[3] [a]

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[2] Parker v. Kelly, 10 Smedes & M. 184. A vendor had given a bond to convey land, and had taken the vendee's notes for the price, one of which notes he assigned to the plaintiff, and afterwards gave a deed of the land to the vendee. Subsequently to this conveyance, A recovered a judgment against the vendee, and was about to sell the land in question upon an execution. The plaintiff thereupon brought this suit to enjoin such execution sale, on the ground that the vendor's lien securing his note given by the vendee was prior to the lien of A's judgment. The court held that, having jurisdiction to enjoin said sale, it would go on and settle the rights of all the parties by decreeing a sale of the land, and a payment of the plaintiff's note, and then of A's judgment out of the proceeds.

[3] Franklin Ins. Co. v. McCrea, 4 G. Greene, 229; Com. v. Niagara Ins. Co., 60 N. Y. 619, 3 Thomp. & C. 33; Bidwell v. Astor Ins. Co., 16 N. Y. 263. It should be remarked, however, that all these decisions were made under the reformed procedure, by which legal and equitable remedies may be combined in the same "civil action."

U. S. (12 Pet.) 178; Union Cent. Life Ins. Co. v. Phillips, 102 Fed. 19, 41 C. C. A. 263. See also Griffin v. Griffin, 163 Ill. 216, 45 N. E. 241.

(a) In Union Cent. Life Ins. Co. v. Phillips, 102 Fed. 19, 41 C. C. A. 263, a bill was brought to compel the delivery of a life insurance policy after the death of the insured. The court retained the bill to give final relief on the policy. In North British & Merc. Ins. Co. v. Lathrop, 63 Fed. 508, 70 Fed. 429, 433, 25 U. S. App. 443, an injunction was issued against an action at law on an insurance policy. The defendant filed a cross-bill to enforce payment. The injunction was continued until it was too late to sue at law. Accordingly it was held that the court would grant the legal relief prayed for by the cross-bill, "If its object is to obtain complete relief concerning the matters set out in the original bill, even though it be affirmative in character, it need not, as against the plaintiff in such original bill, show any ground of equity to support the jurisdiction of the court." In Continental Ins. Co. v. Garrett, 125 Fed. 589, it was held that the court having obtained jurisdiction to set aside an award of insurance arbitrators may properly retain the case to determine the amount of damages. *Contra*, in Stout v. Phœnix Assur. Co. (N. J. Eq.), 56 Atl. 691, a bill to set aside an appraisement of property destroyed by fire, the court refused, under the view of the jurisdiction entertained in New Jersey, to retain the case in order to determine the extent of liability.

When equity takes jurisdiction to *reform* an instrument, it may go on and decree full relief thereon. Haynes

§ 239. A suit was brought by creditors of a firm against the administrator of a deceased partner, to restrain him from using and disposing of certain assets which were really firm assets, under the claim that they belonged to the decedent's individual estate. The court, expressly invoking the general principle, held that, having acquired jurisdiction over a part of the matter, it would go on and decree a full and final winding up and settlement of all the partnership matters.[1] [a] In a certain judicial proceeding in which a preliminary injunction had been issued, two injunction bonds had been given by the same party as principal, but with different sureties. The injunction having been finally dissolved, the several persons enjoined were separately injured by the injunction, and therefore claimed different amounts of damages. These several persons joined as co-plaintiffs in an equity suit against the obligors, principal and sureties, on the two bonds, to recover the amounts of damages to which they were respectively entitled. The court retained the cause, and decreed complete relief, determining the sums to be paid by the defendants, and also the share of each plaintiff. Having jurisdiction to settle the rights of the several obligees, the plaintiffs, to the proceeds, the court could in one equity suit finally settle the rights and liabilities of all the parties, and thus save time, expense, and unnecessary litigation.[2] In a suit brought in the United States circuit court for the infringement of a patent right, which, under the constitution and statutes of Congress, belongs to the exclusive jurisdiction of that tribunal, the court retained the cause, and gave to the plaintiff full relief by injunction, and an account of profits on a contract which had been made between the parties for the use of the patent by the defendant, which contract had been violated by the defendant. It should be particularly noticed that the cause of action arising out of the breach of this contract alone did not of itself come within the equity jurisdiction of the United States courts.[3]

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[1] Martin v. Tidwell, 36 Ga. 332, 345.

[2] Oelrichs v. Spain, 15 Wall. 211, 228, per Swayne, J.

v. Whitsett, 18 Oreg. 454, 22 Pac. 1072; Imperial Shale Brick Co. v. Jewett, 169 N. Y. 143, 62 N. E. 167; Kelly v. Galbraith, 186 Ill. 593, 58 N. E. 431; Keith v. Henkleman, 173 Ill. 137, 50 N. E. 692. And see Harvey v. United States, 105 U. S. 671, where the Court of Claims gave such relief under authority of a special statute.

(a) Likewise, in Kayser v. Mongham, 8 Colo. 232, 6 Pac. 803, suit was brought by one claiming to be an equitable owner of realty because of partnership transactions for the purpose of compelling a conveyance of the legal title. This relief was denied, but the court retained the case for an account and a settlement of the partnership affairs.

§ 240. In a suit by a vendee to set aside a contract for the sale of land, on the ground of the vendor's fraud, or because he is unable to give a good title, the court will award a repayment of the purchase-money already paid, or damages, or make any other additional decree which the justice of the case may require.[1] In a similar manner, a suit having been brought by the heirs of the next of kin or a decedent against his administrator, to set aside a decree of a probate court confirming his accounts and ordering a sale of real estate, which the administrator had obtained by fraud, the court held that, having obtained jurisdiction to set aside this fraudulent decree, it would grant complete and final relief, by directing an account of all his proceedings by the administrator, and a settlement and distribution of the estate, although the general jurisdiction over administrations had been conferred by statute upon the probate court.[2]

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[3] Brooks v. Stolley, 3 McLean, 523, 529, per McLean, J.: "Having jurisdiction [i. e., by the infringement], the court may decide other matters between the parties, which of themselves might not afford ground for the original exercise of jurisdiction."

[1] Hepburn v. Dunlop, 1 Wheat. 179, 197, per Washington, J.: "Generally speaking, a court of law is competent to afford an adequate relief to either party for a breach of the contract by the other, from whatever cause it may have proceeded; and whenever this is the case, a resort to a court of equity is improper. But if the contract ought not in conscience to bind one of the parties, as if he had acted under a mistake, or was imposed upon by the other party, or the like, a court of equity will interfere and afford a relief which a court of law cannot, by setting aside the contract; and having thus obtained jurisdiction of the principal question, that court will proceed to make such other decree as the justice of the case may require."

§ 241. Money arising from a sheriff's sale made in the course of a pending suit was paid into court. This fund, after an examination before a master, was found by him to be applicable upon a certain judgment in favor of one S. One L. alleged that such judgment had in fact been given to secure a debt due to himself, and he therefore claimed the money. The court held that it had incidental jurisdiction to decide these conflicting claims arising in the course of the principal suit, and to distribute the fund among the rightful owners.[1] The defendant, by one wrongful act and in one mass, detained a quantity of chattels belonging to the plaintiff. A part of these were articles of a special nature and personal value, for which damages could not adequately be ascertained, and in respect of which the equity jurisdiction to compel their restoration was clear. The remaining portion were ordinary chattels, of a kind readily purchasable in the market, and for which damages could be assessed without difficulty. The plaintiff brought a suit in equity to compel the restoration of the entire mass of chattels. The court held that since its jurisdiction attached over the one class of articles, it would decide the whole controversy in the one suit, and decree a return of the entire amount, the two kinds being connected by the single wrongful act of the defendant.[2] Certain lands had been assigned to a widow, by virtue of her dower

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§ 240, [2] Keeton v. Spradling, 13 Mo. 321, 323.

§ 241, [1] Souder's Appeal, 57 Pa. St. 498, 502. "Where a court of equity once obtains rightful jurisdiction of a subject, it will comprehend within its grasp and decide all incidental matters necessary to enable it to make a full and final determination of the whole controversy, and thus to terminate litigation, while it facilitates the remedy: McGowin v. Remington, 12 Pa. St. 56, 51 Am. Dec. 504."

§ 241, [2] McGowin v. Remington, 12 Pa. St. 56, 63, 51 Am. Dec. 584. The whole opinion in this case is able and instructive.

right. Part of these lands were occupied by tenants under a lease made by her husband during his lifetime, and a part were occupied by tenants under leases made by the administrator after the husband's death and before the assignment to the widow. She brought a suit in equity against the administrator and these tenants, to recover the rents of the lands assigned to her which had accrued after her husband's death and before the assignment, namely, the rents under the lease made by her husband, and the rents arising under the leases made by the administrator. The suit was held to be properly brought; and the jurisdiction having attached, the court would do full justice by settling an account of the rents due or paid by the tenants of the administrator up to the time when the administrator's possession was terminated by the assignment and delivery of the land to the widow, although such rents might be recovered by her in an action at law.[3] In a suit to compel the delivery of certain written instruments under an agreement, the court decreed that defendant should repay moneys expended by the plaintiff in connection with their contract.[4] One or two other cases depending upon peculiar circumstances will be found in the foot-note.[5] [a]

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[3] Boyd v. Hunter, 44 Ala. 705, 719; citing Stow v. Bozeman's Ex'rs, 29 Ala. 397.

[4] Clarke v. White, 12 Pet. 178, 187, 188.

[5] Phelan v. Boylan, 25 Wis. 679: The owners in fee in reversion of certain lands after a life tenant by the curtesy in possession brought a suit to compel him to hold a tax title of the premises which he had obtained, for the benefit of their reversionary estate as well as for his own life interest. The court held that, having acquired jurisdiction for this purpose, it would grant further relief necessary to maintain the rights of the plaintiffs; viz.,

(a) **Miscellaneous Instances.**— Where a proper case is made out for *cancellation* of an instrument, full relief may be given. United States v. Union Pac. R. Co., 160 U. S. 1, 16 Sup. Ct. 190. This relief may consist of money damages, as in Pioneer Sav. & Loan Co. v. Peck, 20 Tex. Civ. App. 111, 49 S. W. 160, or it may be some purely equitable relief. In Shipman v. Furniss, 69 Ala. 555, 44 Am. Rep. 528, a bill was brought to cancel a deed obtained by fraud as a cloud on title. The court said: "It is true that the jurisdiction of a court of equity cannot be invoked when the

§ 242. Effect of the Reformed Procedure on the Doctrine.—

It was a fundamental conception of the equity jurisprudence, from the earliest periods as soon as its jurisdiction became established and its peculiar methods became developed, that the court of chancery, in any cause coming

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it compelled the defendant to refund moneys which the plaintiffs had been compelled to pay for the taxes assessed on the premises through several years, in order to save them from tax sale, he having intentionally neglected to pay such taxes; and it might compel him to give security to pay the taxes which might be assessed in future. State v. McKay, 43 Mo. 594, 598: The attorney-general brought this suit against certain executive officers of the state, and against the vendees, charging fraud in the sale of a railroad which had belonged to the state, and praying for a rescission of the sale, an accounting, and general relief. While the suit was pending, the legislature passed a statute confirming the sale, and the title to the road of the vendees. The defendants claimed that the jurisdiction of the court was thereby ended. The court, however, asserted its continued jurisdiction, invoking the general principle under discussion, and holding that it might sometimes award damages when it had obtained jurisdiction on other grounds. "And so, too, it will afford such relief as the altered situation of the parties or of the subject-matter requires, if sufficient remains to warrant equitable interference."

sole ground of equitable interference is a removal of a cloud from the title, unless the complainant is, at the time, in possession. But the rule is different when other distinct grounds of jurisdiction are averred."

Similarly, when equity takes jurisdiction to *quiet title* it may retain the case for such further relief as may be proper. Slegel v. Herbine, 148 Pa. St. 236, 23 Atl. 996, 15 L. R. A. 547; Elk Fork Oil & Gas Co. v. Jennings, 84 Fed. 839; Bryan v. McCann (W. Va.), 47 S. E. 143 (suit to remove cloud on title). In Harding v. Fuller, 141 Ill. 308, 30 N. E. 1053, a bill to quiet title was retained to put the complainant in possession. Under the burnt record act in Illinois it has been held that such a bill may be retained although the right to possession is involved. Gormley v. Clark, 134 U. S. 338, 10 Sup. Ct. 554. In Salem Imp. Co. v. McCourt, 26 Oreg. 93, 41 Pac. 1105, it was held that a bill to quiet title may be retained for the purpose of determining a boundary.

The principle applies as well to bills to *set aside fraudulent conveyances*, and full relief will be granted. Chrislip v. Teter, 43 W. Va. 356, 27 S. E. 288; Brock v. Berry, 132 Ala. 95, 90 Am. St. Rep. 896, 31 South. 517; Adee v. Hallett, 3 App. Div. 308, 38 N. Y. Supp. 273; Carpenter v. Osborn, 102 N. Y. 552, 7 N. E. 823.

In Chase v. Boughton, 93 Mich. 285, 54 N. W. 44, a bill to *set aside a forfeiture* of a contract was retained to award damages.

In actions for *partition* it is sometimes held that the court may determine the legal title. Cecil v. Clark, 44 W. Va. 659, 30 S. E. 216; Wilson v. Dresser, 152 Ill. 387, 38 N. E. 888.

before it for decision, if the circumstances of the case would permit, and all the parties in interest were or could be brought before it, would strive to determine the entire controversy, to award full and final relief, and thus to do complete justice to all the litigants, whatever might be the amount or nature of their interest in the single proceeding, and thus to bring all possible litigation over the subject-matter within the compass of one judicial determination. We have seen, in the foregoing paragraphs, that this conception of the equity jurisprudence has been steadily applied throughout the whole history of the court to a great

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But see Kilgore v. Kilgore, 103 Ala. 614, 15 South. 897. In Holloway v. Hollaway, 97 Mo. 628, 11 S. W. 233, 10 Am. St. Rep. 339; Herrick v. Lynch, 150 Ill. 283, 37 N. E. 221, bills for partition were retained for purposes of an account.

Bills to enforce or *foreclose liens* are frequently retained for money judgments. Evans v. Kelly, 49 W. Va. 181, 38 S. E. 497; Fidelity Tr. & G. Co. v. Fowler Water Co., 113 Fed. 560; Albrecht v. C. C. Foster Lumber Co., 126 Ind. 318, 26 N. E. 157; Rison v. Moon, 91 Va. 384, 22 S. E. 165. In Hathaway v. Hagan, 64 Vt. 135, 24 Atl. 131, a bill was brought to foreclose a mortgage. The court found that the notes had been more than paid, and retained jurisdiction to relieve the defendant on a cross-bill.

Likewise, the jurisdiction will be retained when a bill is brought to *redeem*. Schmid v. Lisiewski, 53 N. J. Eq. 670, 31 Atl. 603; Vick v. Beverly, 112 Ala. 458, 21 South. 325; Middle States L., B. & C. Co. v. Hagerstown, M. & U. Co., 82 Md. 506, 33 Atl. 886. A bill to discharge a mortgage was retained to award the surplus due from the mortgagee for rents. Whetstone v. McQueen, 137 Ala. 301, 34 South. 229.

In Walters v. Farmers' Bank, 76 Va. 12, it is held that when a suit is brought on a note of a married woman to *charge her separate estate*, and her indorser is joined as defendant, if for any cause developed in the suit recourse against her separate estate fails, the plaintiff may have relief against the indorser. In Beecher v. Lewis, 84 Va. 630, it was said that the doctrine was expressly applicable where there are *accounts* to be discovered and examined; and that where jurisdiction has once been acquired to settle accounts arising under a trust deed, the court may render a personal decree for the balance due from the debtor beyond the sum realized by the sale under the trust deed.

In the following miscellaneous cases the principle is applied: Bank of Stockham v. Alter, 61 Nebr. 359, 85 N. W. 300; Kirschbaum v. Coon, (Va.), 25 S. E. 658; Hotchkiss v. Fitzgerald P. P. P. Co., 41 W. Va. 357, 23 S. E. 576; Hanly v. Watterson, 39 W. Va. 214, 19 S. E. 536; Schwab v. Frisco M. & M. Co., 21 Utah, 258, 60 Pac. 940; Swingle v. Brown (Tenn. Ch. App.), 48 S. W. 347; Evins v. Cawthon, 132 Ala. 184, 31 South. 441; Vicksburg & Y. C. Tel. Co. v. Citizens' Tel. Co., 79 Miss.

variety of circumstances, litigations, and reliefs. By virtue of its operation, and in order to promote justice, the court, having obtained jurisdiction of a controversy for some purpose clearly equitable, has often extended its judicial cognizance over rights, interests, and causes of action which were purely *legal* in their nature, and has awarded remedies which could have been adequately bestowed by a court of law. This same grand principle is one of the fundamental and essential thoughts embodied in the "reformed system of procedure," which first appeared

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341, 89 Am. St. Rep. 656, 30 South. 725; Whipple v. Farrar, 3 Mich. 436, 64 Am. Dec. 99; Reyburn v. Mitchell, 106 Mo. 365, 16 S. W. 592, 27 Am. St. Rep. 350; Vaught v. Meador, 99 Va. 569, 39 S. E. 225, 86 Am. St. Rep. 908; Gleason & Bailey Mfg. Co. v. Hoffman, 168 Ill. 25, 48 N. E. 143; Pinkum v. City of Eau Claire, 81 Wis. 301, 51 N. W. 550; Balsley v. Balsley, 116 N. C. 472, 21 S. E. 954; Williamson v. Moore, 101 Fed. 322; Olson v. Lamb, 61 Nebr. 484, 85 N. W. 397; Cunningham v. City of Cleveland, 98 Fed. 657, 39 C. C. A. 211; Bath Paper Co. v. Langley, 23 S. C. 129; Watson v. Watson (Tenn. Ch. App.), 57 S. W. 385; Nichol v. Stewart, 36 Ark. 612; Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 29 Fed. 546; Little Rock, etc., R. R. Co. v. Perry, 37 Ark. 164; Buchanan v. Griggs, 20 Nebr. 165, 29 N. W. 297; Winton's Appeal, 97 Pa. St. 385; Conger v. Cotton, 37 Ark. 286; Marine, etc., Mfg. Co. v. Bradley, 105 U. S. 182; Swift v. Dewey, 20 Nebr. 107, 29 N. W. 254; Ober v. Gallagher, 93 U. S. 199; Howards v. Selden, 4 Hughes, 310, 5 Fed. 465, 473; City of Centerville v. Fidelity Trust & Guaranty Co., 118 Fed. 332, 55 C. C. A. 348; Barrett v. Twin City Power Co., 118 Fed. 861; Twin City Power Co. v. Barrett, 126 Fed. 302; State v. Fredlock, 52 W. Va. 232, 94 Am. St. Rep. 932, 43 S. E. 153.

In Norton v. Sinkhorn, 61 N. J. Eq. 508, 48 Atl. 822; modified, 63 N. J. Eq. 313, 50 Atl. 506, it was held that a court of equity will not give a decree for unliquidated damages. The court ordered the case retained until the damages could be assessed at law.

"When a complainant files a bill that properly falls under one or another of the heads of ordinary chancery jurisdiction, the right of the defendant to maintain a cross-bill that is germane to the original bill is not dependent upon the validity of the claim made in the original bill." Biegler v. Merchants' Loan & Tr. Co., 164 Ill. 197, 45 N. E. 512. In this case the plaintiff sought to enjoin the collection of notes. The defendant set up that he was a fair purchaser, and asked judgment for the amount due. This relief was given. See also Pratt v. Boody, 55 N. J. Eq. 175, 35 Atl. 1113.

In some jurisdictions it is held that a bill will not be retained for complete relief unless the legal relief is asked for in the bill. Hawes v. Dobbs, 137 N. Y. 465, 33 N. E. 560; Dinwiddie v. Bell, 95 Ill. 360. See also Waldron v. Harvey (W. Va.), 46 S. E. 603.

in 1848, in the New York Code of Civil Procedure, has since extended through so many states and territories of this country and colonies of Great Britain, and was substantially adopted for England in the "Supreme Court of Judicature Acts." That system of procedure, by combining the actions at law and suits in equity into one "civil action," by permitting the union of legal and equitable primary rights, and interests, and causes of action in the one judicial proceeding, and the granting of legal and equitable remedies in the one judgment, and by the substitution of many equity rules concerning the prosecution of suits in place of the arbitrary rules of the law regulating the conduct of actions, has greatly enlarged the operation and increased the efficiency of the general doctrine under discussion. Wherever the true spirit of the reformed procedure has been accepted and followed, the courts not only permit legal and equitable causes of action to be joined, and legal and equitable remedies to be prayed for and obtained, but will grant purely legal reliefs of possession, compensatory damages, pecuniary recoveries, and the like, in addition to or in place of the specific equitable reliefs demanded in a great variety of cases which would not have come within the scope of the general principle as it was regarded and acted upon by the original equity jurisdiction, and in which, therefore, a court of equity would have refrained from exercising such a jurisdiction.[a] The full discussion of this great change wrought by the modern

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(a) Cited in Thomson v. Locke, 66 Tex. 383; Swope v. Missouri Trust Co., 26 Tex. Civ. App. 133, 62 S. W. 947; quoted, Armstrong v. Mayer (Nebr.), 95 N. W. 51. See also Kayser v. Mongham, 8 Colo. 232, 6 Pac. 803; Danielson v. Gude, 11 Colo. 87, 17 Pac. 283; Bullion, B. & C. Min. Co. v. Eureka Hill Min. Co., 5 Utah, 3, 11 Pac. 515; Giant Powder Co. v. San Diego Flume Co., 78 Cal. 193, 20 Pac. 419; Murtha v. Curley, 90 N. Y. 373; Larrabee v. Given (Nebr.), 91 N. W. 504; Evans v. McConnell (Iowa), 63 N. W. 570; Disher v. Disher, 45 Nebr. 100, 63 N. W. 368; Green Bay Lumber Co. v. Miller (Iowa), 62 N. W. 742; Turner v. Newman (Ky.), 39 S. W. 504; Valentine v. Richards, 126 N. Y. 272, 27 N. E. 255; Hull v. Bell, 54 Ohio, 228, 43 N. E. 584; Hanna v. Reeves, 22 Wash. 6, 60 Pac. 62; Field v. Holzman, 93 Ind. 205; Watson v. Sutro, 86 Cal. 500, 24 Pac. 172, 25 Pac. 64.

legislation is postponed to a subsequent chapter; I shall merely place in the foot-note a few illustrative cases as examples of the manner in which the scope of the equitable jurisdiction has been thus enlarged.[1]

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[1] Laub v. Buckmiller, 17 N. Y. 620, 626; Lattin v. McCarty, 41 N. Y. 107, 109, 110; Davis v. Lamberton, 56 Barb. 480, 483; Brown v. Brown, 4 Rob. (N. Y.) 688, 700, 701; Welles v. Yates, 44 N. Y. 525; Cone v. Niagara Ins. Co., 60 N. Y. 619, 3 Thomp. & C. 33; Anderson v. Hunn, 5 Hun, 79; N. Y. Ice Co. v. N. W. Ins. Co., 23 N. Y. 357, 359; Cahoon v. Bank of Utica, 7 N. Y. 486; Broiestedt v. South Side R. R., 55 N. Y. 220, 222; Linden v. Hepburn, 3 Sand. 668, 671; Bidwell v. Astor Ins. Co., 16 N. Y. 263, 267; Phillips v. Gorham, 17 N. Y. 270; Caswell v. West, 3 Thomp. & C. 383; Graves v. Spier, 58 Barb. 349, 383, 384; Sternberger v. McGovern, 56 N. Y. 12; Marquat v. Marquat, 12 N. Y. 336; Barlow v. Scott, 24 N. Y. 40, 45; Emery v. Pease, 20 N. Y. 62, 64; Bradley v. Aldrich, 40 N. Y. 504, 100 Am. Dec. 528; Walker v. Sedgwick, 8 Cal. 398; Gray v. Dougherty, 25 Cal. 266; Henderson v. Dickey, 50 Mo. 161, 165; Guernsey v. Am. Ins. Co., 17 Minn. 104, 108; Montgomery v. McEwen, 7 Minn. 351; Turner v. Pierce, 34 Wis. 658, 665; McNeady v. Hyde, 47 Cal. 481, 483; Tenney v. State Bank, 20 Wis. 152; Leonard v. Logan, 20 Wis. 540, 542; Foster v. Watson, 16 B. Mon. 377, 387; White v. Lyons, 42 Cal. 279, 282. The decisions, however, are not entirely unanimous. In some cases the court has not only refused to accept and act upon the spirit of the reformed procedure, but has even, as it would seem, failed to recognize the principle which belonged to the original jurisdiction of equity, the principle that, having obtained a jurisdiction for any purpose, the court might and should give full relief and do complete justice. See Hudson v. Caryl, 44 N. Y. 553; Supervisors v. Decker, 30 Wis. 624, 626–630; Noonan v. Orton, 21 Wis. 283; Horn v. Luddington, 32 Wis. 73; Dickson v. Cole, 34 Wis. 621, 625; Turner v. Pierce, 34 Wis. 658, 665; Deery v. McClintock, 31 Wis. 195; Lawe v. Hyde, 39 Wis. 345; Cord v. Lackland, 43 Mo. 139; Bobb v. Woodward, 42 Mo. 482; Peyton v. Rose, 41 Mo. 257, and other similar cases in Missouri, which were all, however, overruled in the later case of Henderson v. Dickey, 50 Mo. 161, 165, in which the court adopted and acted upon the true spirit and intent of the reformed procedure.

SECTION IV.

THE DOCTRINE THAT JURISDICTION EXISTS IN ORDER TO PREVENT A MULTIPLICITY OF SUITS.

ANALYSIS.

§ 243. The doctrine applies to both kinds of jurisdiction.
§ 244. The questions to be examined stated.
§ 245. Four possible classes of cases to which the doctrine may apply.
§§ 246–248. "Bills of peace," *rationale* of, and examples.
§ 248. Bills "to quiet title" explained.
§§ 249–251. *Rationale* of the doctrine examined on principle.
[§ 251½. Jurisdiction not exercised when that would be ineffectual; simplifying of the issues essential.
§ 251¾. There must be a practical necessity for the exercise of the jurisdiction.]
§§ 252–261. Examination of the doctrine upon judicial authority.
§ 252. First class.
§§ 253, 254. Second class.
§§ 255–261. Third and fourth classes.
§ 256. Community of interest: "Fisheries Case"; "Case of the Duties."
§ 257. Where proprietors of distinct tracts of land have been injured by one wrong.
§ 258. Where proprietors of distinct tracts of land have been relieved from illegal local assessments.
§§ 259, 260. General rule as to relief from illegal taxes, assessments, and public burdens, on the ground of multiplicity of suits.
§ 261. Other special cases of the third and fourth classes.
§§ 262–266. Examination of opposing decisions; conclusions reached by such decisions.
§ 263. In the first and second classes.
§§ 264–266. In the third and fourth classes.
§§ 265, 266. In cases of illegal taxes and other public burdens.
§§ 267–270. Conclusions derived from the entire discussion.
§§ 268–270. Ditto as to the third and fourth classes.
§§ 271–274. Enumeration of cases in which the jurisdiction to avoid a multiplicity of suits has been exercised.
§ 271. Cases of the first class.
§ 272. Cases of the second class.
§ 273. Cases of the third class.
§ 274. Cases of the fourth class.
§ 275. The jurisdiction based upon statute.

§ 243.[a] **Applies to Both Kinds of Jurisdiction.**— The doctrine that a court of equity may take cognizance of a con-

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(a) This section is cited in Liverpool & L. & G. Ins. Co. v. Clunie, 88 Fed. 160, 167; Preteca v. Maxwell Land Grant Co. (C. C. A.), 50 Fed. 674; Kellogg v. Chenango Valley Sav. Bk., 42 N. Y. Supp. 379, 11 troversy, determine the rights of all the parties, and grant the relief requisite to meet the ends of justice, in order to *prevent a multiplicity of suits,* has already been briefly mentioned in a preceding section upon the "concurrent jurisdiction." The same remarks which were made at the commencement of the last section concerning the general principle that when a court of equity has acquired jurisdiction over part of a matter, or over a matter for some particular purpose, it may go on and determine the whole controversy and confer complete relief, apply with equal truth and force to the doctrine now under consideration, and need not therefore be repeated.[1] Like that general principle, the "prevention of a multiplicity of suits" produces a material effect upon both the concurrent and the exclusive jurisdictions. It is sometimes one of the very foundations of the concurrent jurisdiction,— an efficient cause of its existence. In fact, the "multiplicity of suits" which is to be prevented *constitutes the very inadequacy of legal methods and remedies* which calls the concurrent jurisdiction into being under such circumstances, and authorizes it to adjudicate upon purely legal rights, and confer purely legal reliefs.[b] On the other hand, the prevention of a multiplicity of suits is the *occasion* for the exercise of the exclusive jurisdiction. The multiplicity of suits to be avoided, which are generally actions at law,[c] shows that the legal remedies are inadequate, and cannot meet the ends of justice, and therefore a court of equity interferes, and although the primary rights and interests of the parties are legal in their nature, it takes cognizance of them, and awards some specific equitable remedy, which gives, perhaps in one proceeding, more substantial relief than could be obtained in numerous actions at law. This is the true theory of the doctrine in its application to the two jurisdictions.

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[1] See *ante,* § 181.

App. Div. 458; Golden v. Health Department, 47 N. Y. Supp. 623, 21 App. Div. 420; State v. Sunapee Dam Co. (N. H.), 55 Atl. 899; Dennis v. Mobile & Montgomery R'y Co., 137 Ala. 649, 657, 35 South. 30, 97 Am. St. Rep. 69, 72. The chapter is cited generally in Hale v. Allinson, 188 U. S. 56, 23 Sup. Ct. 244, a case recognizing but distinguishing the author's "fourth class;" Pollock v. Okolona Sav. Inst., 61 Miss. 293, a case recognizing the author's "fourth class;" Van Auken v. Dammeier, 27 Oreg. 150, 40 Pac. 89, recognizing but distinguishing the "third class;" Hughes v. Hannah, 39 Fla. 356, 379, 22 South. 613; Waddingham v. Robledo, 6 N. M. 347, 28 Pac. 663; Bradley v. Bradley, 165 N. Y. 183, 58 N. E. 887; McConnaughy v. Pennoyer, 43 Fed. 342; Muncie Nat. Gas Co. v. City of Muncie, 160 Ind. 97, 66 N. E. 436; Turner v. City of Mobile, 135 Ala. 73, 33 South. 133, 140.

(b) Quoted, Louisville, N. A. & C. R. R. Co. v. Ohio Val., I. & C. Co., 57 Fed. 42, 45; Edgerton v. Edgerton, 12 Mont. 122, 29 Pac. 966, 33 Am. St. Rep. 557, 16 L. R. A. 94.

§ 244. **Questions Stated.**[a]— The general and vague statement, that equity will interfere and take cognizance of a matter in order to prevent a multiplicity of suits, is made in innumerable judicial *dicta,* and the general doctrine is asserted in many decisions. But when we inquire what is the exact extent of this doctrine, in what kinds and classes of cases is a court of equity empowered to exercise its jurisdiction and administer reliefs, in order to prevent a multiplicity of suits, we shall find not only a remarkable uncertainty and incompleteness in the judicial utterances, but even a direct conflict of decisions. Indeed, the difficulty is still more fundamental. The courts are not only at variance with respect to the particular classes of cases in which the doctrine should be applied, and their jurisdiction thereby asserted, but they seem also to be unsettled even with respect to the meaning, theory, or *rationale* of the doctrine itself as a foundation of their jurisdiction or an occasion for its exercise. That this language does not misrepresent the attitude of the courts will most clearly appear from decisions cited in subsequent paragraphs. It is a matter of great practical importance to end, if possible, this condition of doubt and uncertainty. I purpose, therefore, so far as I may be able, to ascertain and explain the true meaning and *rationale* of the doctrine concerning the pre-

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(c) Cited and explained, Allegany & K. R. R. Co. v. Weidenfeld, 25 N. Y. Supp. 71, 76, 5 Misc. Rep. 43.

(a) This and the following sections are cited in American Cent. Ins. Co. v. Landau, 56 N. J. Eq. 513, 39 Atl. 400, a case belonging in the author's "third class."

vention of a multiplicity of suits as a source or an occasion of the equity jurisdiction; to determine upon principle, and from the weight of judicial authority, the extent of its operation, and the limits which have been placed upon it; and finally, to describe the various kinds and classes of cases in which the equity jurisdiction may or may not be exercised in pursuance of this doctrine.

§ 245. **Possible Conditions in Which the Doctrine may Apply.**[a] — It will aid us in reaching the true theory as well as in determining the extent and limitations of the doctrine, if we can fix at the outset all the *possible* conditions in which a multiplicity of suits can arise, and can thus furnish a source of or occasion for the equity jurisdiction in their prevention by settling *all* the controversy and *all* the rights in one single judicial proceeding. All these *possible* conditions may be reduced to the four following classes: 1. Where, from the nature of the wrong, and from the settled rules of the legal procedure, the same injured party, in order to obtain all the relief to which he is justly entitled, is obliged to bring a number of actions against the same wrong-doer, all growing out of the one wrongful act and involving similar questions of fact and of law. To this class would belong cases of nuisance, waste, continued trespass, and the like.[b] 2. Where the dispute is between two individuals, A and B, and B institutes or is about to institute a number of actions either successively or simultaneously against A, all depending upon the same legal questions and similar issues of fact, and A by a single equitable suit seeks to bring them all within the scope and effect of one judicial determination. A familiar example of one branch of this class is the case where B has brought repeated actions of ejectment to recover the same tract of land in A's possession, and A finally resorts to a suit in equity by which his own title is finally established and quieted, and all further actions of ejectment by B are enjoined. 3. Where a number of persons have separate and individual claims and rights of action against the same party, A, but all arise from some common cause, are governed by the same legal rule, and involve similar facts, and the whole matter might be settled in a single suit brought by all these persons uniting as co-plaintiffs, or one of the persons suing on behalf of the others, or even by one person suing for himself alone.[c] The case of several owners of distinct parcels of land upon which the same illegal assessment or tax has been laid is an example of this class. 4. Where the same party, A, has or claims to have some common right against a number of persons, the establishment of which would regularly require a separate action brought by him against each of these persons, or brought by each of them against him, and instead thereof he might procure the whole to be determined in one suit brought by himself against all the adverse claimants as co-defendants.[d] It should be observed in this connection that the prevention of a multiplicity of suits as a ground for the equity jurisdiction does not mean the complete and absolute interdiction or prevention of any litigation concerning the matters

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[a] This section is cited generally in M'Mullin's Adm'r v. Sanders, 79 Va. 356, 364. Sections 245–273 are cited generally in Louisville & N. R. Co. v. Smith (C. C. A.), 128 Fed. 1, 6.

[b] This section is cited in Preteca v. Maxwell Land Grant Co., 1 C. C. A. 607, 50 Fed. 674; Golden v. Health Department, 47 N. Y. Supp. 623, 21 App. Div. 420; Warren Mills v. N. O. Seed Co., 65 Miss. 391, 4 South. 298, 7 Am. St. Rep. 671, cases of this class.

(c) Quoted, Pennefeather v. Baltimore Steam Packet Co., 58 Fed. 481; Boyd v. Schneider (C. C. A.), 131 Fed. 223, reversing 124 Fed. 239; Washington Co. v. Williams, 111 Fed. 801, 815, 49 C. C. A. 621, dissenting opinion of Sanborn, Cir. J.; Lovett v. Prentice, 44 Fed. 459; Osborne v. Wisconsin Cent. R. Co., 43 Fed. 824, by Harlan, J.; City of Chicago v. Collins, 175 Ill. 445, 51 N. E. 907; American Cent. Ins. Co. v. Landau, 56 N. J. Eq. 513, 39 Atl. 400; Turner v. City of Mobile, 135 Ala. 73, 33 South. 133; Snyder v. Harding (Wash.), 75 Pac. 812. This section is cited in Liverpool & L. & G. Ins. Co. v. Clunie, 88 Fed. 160, 167; Sullivan Timber Co. v. City of Mobile, 110 Fed. 186; Virginia-Carolina Chemical Co. v. Home Ins. Co., 113 Fed. 1, 5, cases of this class.

(d) This section is cited in De Forest v. Thompson, 40 Fed. 375; Lasher v. McCreery, 66 Fed. 834, 843; New York Life Ins. Co. v. Beard, 80 Fed. 66, cases of the "fourth class." Quoted, City of Chicago v. Collins, 175 Ill. 445, 51 N. E. 907, 49 L. R. A. 408; Boyd v. Schneider (C. C. A.), 131 Fed. 223, reversing 124 Fed. 239.

in dispute, but the substitution of one equitable suit in place of the other kinds of judicial proceeding, by means of which the entire controversy may be finally decided. The further discussion will involve the inquiry whether the doctrine in question is applied to all of the foregoing classes of cases; and if so, what are the extent and limitations of its operation in each class? In pursuing this discussion, I shall examine, first, in order, the *rationale,* extent, and general operations of the doctrine; then the limitations upon it; and finally, the particular instances of its application, arranged according to the foregoing classes.

§ 246. **Bills of Peace.**— The earliest instances in which the court of chancery exercised its jurisdiction, avowedly upon the ground of preventing a multiplicity of suits, appear to have been called "bills of peace," of which there were two distinct kinds. One of these was brought to establish a general right between a single party on the one side, and numerous persons claiming distinct and individual interests on the other, plainly corresponding, in part at least, with the third and fourth classes mentioned in the preceding paragraph. The other kind was permitted to quiet the complainant's title to and possession of land, and to restrain any further actions of ejectment to recover the premises by a single adverse claimant, after several successive actions had already been prosecuted without success, on the ground that the title could never be *finally* established by an indefinite repetition of such legal actions, and justice demanded that complainant should be protected against vexatious litigation. This form of the original bill of peace corresponds to the first branch of the second class described in the preceding paragraph.[1][a]

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[1] 1 Spence's Eq. Jur. 657, 658; Jeremy's Eq. Jur. 344–347; Adams's Equity, 199–202; 6th Am. ed. 406–410.

(a) The text is cited in Boston & Montana C. C. & S. M. Co. v. Montana Ore P. Co., 188 U. S. 632, 23 Sup. Ct. 434. The distinction between the two classes of bills of peace is clearly stated in Sharon v. Tucker, 144 U. S. 542, 12 Sup. Ct. 720, by Field, J.

§ 247. One of the most frequent purposes of such suits to establish a general right, in earlier periods, seems to have been the ascertaining and settling the customs of a manor, where they were in dispute between the lord of a manor and his tenants or copyholders, or between the tenants of two different manors. A bill might be filed on behalf of the whole body of tenants or copyholders of a particular manor against their lord, or perhaps against the lord or tenants of another manor; or it might be filed by the lord himself against his tenants; and by the decree in such suit, questions concerning various rights of common, or concerning fines or other services due to the lord, or other like matters affecting all the parties, could be finally established, which would otherwise require perhaps a multitude of individual actions. From this early purpose the jurisdiction was easily extended so as to embrace a great number of different but analogous objects.[1]

[1] 1 Spence's Eq. Jur. 657. In Lord Tenham v. Herbert, 2 Atk. 483, Lord Hardwicke thus described these bills: "It is certain that where a man sets up a general and exclusive right, and where the persons who controvert it are very numerous, and he cannot by one or two actions at law quiet that right, he may come into this court first, which is called a bill of peace, and the court will direct an issue to determine the right, as in disputes between lords of manors and their tenants, and between tenants of one manor and another; for in these cases there would be no end of bringing actions of trespass, since each action would determine only the particular right in question between the plaintiff and the defendant." See also the same proposition by Lord Eldon, in Hanson v. Gardiner, 7 Ves. 309, 310. It is not my purpose in this place to enter into any full discussion of "bills of peace." I shall therefore merely add some cases as examples of the extension of the doctrine, and of its application to establish general rights of various kinds. Suits have been sustained by a lord against tenants of the manor, and by tenants against their lord, to establish common and similar rights, or to establish the amount of fines payable by copyhold tenants; by a party in possession against adverse claimants to establish a toll, or right to the profits of a fair; by a parson against his parishioners for tithes; and by parishioners against their parson to establish a *modus*, etc.: Cowper v. Clerk, 3 P. Wms. 157; Midleton v. Jackson, 1 Ch. 18; Powell v. Powis, 1 Lon. & Jer. 159; Brown v. Vermuden, 1 Cas. Ch. 272; Rudge v. Hopkins, 2 Eq. Cas. Abr., p. 170, pl. 27; How v. Tenants of Bromsgrove, 1 Vern. 22; Pawlet v. Ingres, 1 Vern. 308; Ewelme Hospital v. Andover, 1 Vern. 266; Weekes v. Slake, 2 Vern. 301; Arthington v. Fawkes, 2 Vern. 356; Conyers v. Abergavenny, 1 Atk. 284, 285; Poor v. Clarke, 2 Atk. 515; Hanson v.

§ 248. **Bills to Quiet Title.**— The grounds and purposes of the second form of the "bill of peace," as it was originally adopted, are very clearly stated by Lord Redesdale in his well-known and authoritative treatise upon equity pleadings: "In many cases, the courts of ordinary jurisdiction admit, at least for a certain time, of repeated attempts to litigate the same question. To put an end to the oppression occasioned by the abuse of this privilege, the courts of equity have assumed a jurisdiction. Thus actions of ejectment, which, as now used, are not part of the old law, have become the usual mode of trying titles at the common law, and judgments in those actions not being conclusive, the court of chancery has interfered, and after repeated trials and satisfactory determinations of the question, has granted perpetual injunctions to restrain further litigation, and thus has in some degree put that restraint upon litigation which was the policy of the ancient law in real actions."[1] [a]

Gardiner, 7 Ves. 305, 309, 310; Corporation of Carlisle v. Wilson, 13 Ves. 279, 280; Ware v. Horwood, 14 Ves. 32, 33; Dilley v. Doig, 2 Ves. 486; Duke of Norfolk v. Myers, 4 Madd. 83, 117; Sheffield Water Works v. Yeomans, L. R. 2 Ch. 8; Phillips v. Hudson, L. R. 2 Ch. 243. Also suits by proprietor in possession claiming exclusive right of fishery in certain waters, against numerous other persons asserting rights to fish in the same waters by separate and independent claims: Mayor of York v. Pilkington, 1 Atk. 282; Lord Tenham v. Herbert, 2 Atk. 483; New River County v. Graves, 2 Vern. 431, 432. Also a suit by a municipal corporation to establish a common duty in the nature of a license fee against a large number of persons, among whom there was no privity of interest, but their relations with each other were wholly separate and distinct: City of London v. Perkins, 3 Brown Parl. Cas., Tomlins's ed., 602; 4 Brown Parl. Cas. 157. But see Bouverie v. Prentice, 1 Brown Ch. 200; Ward v. Duke of Northumberland, 2 Anstr. 469.

[1] Mitford's (Lord Redesdale) Eq. Pl. 143, 144; 1 Spence's Eq. Jur. 658. This particular exercise of its jurisdiction was not finally established by the court of chancery without a considerable struggle. In one case, after five ejectment trials, in all of which a verdict was rendered in favor of

(a) Cited with approval in Bird v. Winger, 24 Wash. 269, 64 Pac. 178; Holland v. Challen, 110 U. S. 15, 3 Sup. Ct. 495; Sharon v. Tucker, 144 U. S. 542, 12 Sup. Ct. 720. Per Field, J.: "To entitle the plaintiff to relief in such cases the concurrence of three particulars was essential: He must have been in possession of the property; he must have been disturbed in its possession by repeated actions at law; and he must have es-

§ 249. Rationale of the Doctrine on Principle.[a]— Having thus seen the historical inception of the doctrine in its earliest application to suits for the establishment of certain kinds of "general rights," and for the quieting of a party's legal title by restraining further actions of ejectment, I

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the complainant, Lord Chancellor Cowper refused to interfere and restrain further actions at law; but his decree was reversed and set aside on appeal by the House of Lords: Earl of Bath v. Sherwin, Prec. Ch. 261, 10 Mod. 1, 1 Brown Parl. Cas. 266, 270, 2 Brown Parl. Cas., Tomlins's ed., 217. The title of the complainant in equity must, of course, have been satisfactorily determined in his favor at law before a court of equity will aid him. But if his right and title have been thus determined, as the rule is now well settled, a court of equity will interfere, without regard to and without requiring any particular *number* of trials at law, whether two or more, even after one trial at law: Leighton v. Leighton, 1 P. Wms. 671, 672; Devonsher v. Newenham, 2 Schoales & L. 208, 209; Earl of Darlington v. Bowes, 1 Eden, 270–272; Weller v. Smeaton, 1 Cox, 102, 1 Brown Ch. 573; Alexander v. Pendleton, 8 Cranch, 462, 468; Trustees of Huntington v. Nicholl, 3 Johns. 566, 589–591, 595, 601, 602; Eldridge v. Hill, 2 Johns. Ch. 281, 282; Patterson v. McCamant, 28 Mo. 210; Knowles v. Inches, 12 Cal. 212, 216; Patterson, etc., R. R. Co. v. Jersey City, 9 N. J. Eq. 434; Bond v. Little, 10 Ga. 395, 400; Harmer v. Gwynne, 5 McLean, 313, 315.

tablished his right by successive judgments in his favor. Upon these facts appearing the court would interpose and grant a perpetual injunction to quiet the possession of the plaintiff against any further litigation from the same source. It was only in this way that adequate relief could be afforded against vexatious litigation and the irreparable mischief which it entailed. Ad. Eq. 202; Pom. Eq. Jur., § 248; Stark v. Starrs, 6 Wall. 409; Curtis v. Sutter, 15 Cal. 259; Shipley v. Rangeley, Daveis (3 Ware), 242; Devonsher v. Newenham, 2 Schoales & L. 208." The opinion in Holland v. Challen, *supra*, also states the distinction between "bills of peace" of this class, and "bills *quia timet*" to remove a cloud on title. "A bill *quia timet*, or to remove a cloud upon the title of real estate, differed from a bill of peace in that it did not seek so much to put an end to vexatious litigation respecting the property, as to prevent future litigation by removing existing causes of controversy as to its title. It was brought in view of anticipated wrongs or mischiefs, and the jurisdiction of the courts was invoked because the party feared future injury to his rights or interests. Story Eq. § 826. To maintain a suit of this character it was generally necessary that the plaintiff should be in possession of the property, and, except when the defendants were numerous, that his title should have been established at law or be founded on undisputed evidence or long continued possession. Alexander v. Pendleton, 8 Cranch, 462; Peirsoll v. Elliott, 6 Pet. 95; Orton v. Smith, 18 How. 263."

(a) Cited, Allegany & K. R. R. Co. v. Weidenfeld, 25 N. Y. Supp. 71, 76, 5 Misc. Rep. 43.

shall endeavor, before following out its subsequent development and further applications, to examine more closely into its real meaning, and to ascertain its true *rationale* and theory. What multiplicity of suits is it which a court of equity will prevent? What party must be harassed, or incommoded, or threatened with numerous litigations, and from whom must such litigation actually and necessarily proceed, in order that a court of equity may take jurisdiction, and prevent it by deciding all the matter in one decree? Finally, how far is the prevention of a multiplicity of suits an *independent* source of the equitable jurisdiction? Can a court of equity ever interfere on behalf of the plaintiff, upon the ground of preventing a multiplicity of suits, where such plaintiff would not otherwise have had any recognized claim for equitable relief or any legal cause of action? Or is it essential that a plaintiff should have some existing cause of action, equitable or legal, some existing right to either equitable or legal relief, in order that a court of equity may interfere and exercise on his behalf its jurisdiction founded upon the prevention of a multiplicity of suits? The proper answer to these questions is plainly involved in any consistent theory of the doctrine; and yet it will be found that they have, either expressly or impliedly, been answered in a contradictory manner by different courts, and hence has arisen the conflict of decision in certain important applications of the doctrine.

§ 250.[a] I will briefly examine these questions upon principle. In the first place, and as a fundamental proposition, it is plain that prevention of a multiplicity of suits is not, considered by itself alone, an independent source or occasion of jurisdiction in such a sense that it can create a cause of action where none at all otherwise existed. In other words, a court of equity cannot exercise its jurisdiction for the purpose of preventing a multiplicity of suits in cases where the plaintiff invoking such jurisdiction has

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(a) This section is cited, generally, in M'Mullin's Adm'r v. Sanders, 79 Va. 356, 364.

not any prior existing cause of action, either equitable or legal; has not any prior existing right to *some* relief, either equitable or legal.[b] The very object of preventing a multiplicity of suits assumes that there are relations between the parties out of which other litigations of *some* form might arise. But this prior existing cause of action, this existing right to some relief, of the plaintiff need not be equitable in its nature.[c] Indeed, in the great majority of cases in which the jurisdiction has been exercised, the plaintiff's existing cause of action and remedial right were purely legal; and it is because the only legal remedy which he could obtain was clearly inadequate to meet the demands of justice, partly from its own inherent imperfect nature, and partly from its requiring a number of simultaneous or successive actions at law, that a court of equity is competent to assume or exercise its jurisdiction. It follows as a

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(b) Quoted, Storrs v. Pensacola & A. R. R. Co., 29 Fla. 617, 634, 11 South. 226, 231; Roland Park Co. v. Hull, 92 Md. 301, 48 Atl. 366; Turner v. City of Mobile, 135 Ala. 73, 33 South. 133, 141. Cited to this effect, Purdy v. Manhattan El. R. R. Co., 13 N. Y. Supp. 295; Allegany & K. R. R. Co. v. Weidenfeld, 25 N. Y. Supp. 71, 76, 5 Misc. Rep. 43.

Thus, where an injunction was sought against repeated trespasses, it was held that "if such trespasses separately be of no real injury, even an infinite repetition of the trespass must be equally harmless;" Purdy v. Manhattan El. R. R. Co., 13 N. Y. Supp. 295. Where jurisdiction is invoked by the complainant to restrain numerous suits brought against him, "its exercise necessarily assumes that the complainant . . . has *some* defense, either legal or equitable, to the numerous suits instituted or threatened against him;" Storrs v. Pensacola & A. R. R. Co., 29 Fla. 617, 11 South. 226. "If a party — to give an illustration — be brought to the bar of a law court in forty separate actions of ejectment for as many distinct parcels of land, by the same plaintiff, upon identical facts in each case, he could not invoke the jurisdiction of equity to a prevention of a multiplicity of suits if he were a mere naked trespasser and wrongdoer in respect to the lands severally sued for; had no title, legal or equitable, no right to the possession, no defense to any of the actions. He cannot invoke equity merely to have his wrong-doing adjudged in one suit instead of forty." Turner v. City of Mobile, 135 Ala. 73, 33 South. 133, 141. See also Town of Mount Zion v. Gillman, 14 Fed. 123.

(c) Quoted, Storrs v. Pensacola & A. R. R. Co., 29 Fla. 617, 634, 11 South. 226, 231; Roland Park Co. v. Hull, 92 Md. 301, 48 Atl. 666. That a bill of peace may lie to restrain equitable actions, see Allegany & K. R. R. Co. v. Weidenfeld, 25 N. Y. Supp. 71, 5 Misc. Rep. 43.

necessary consequence — and this point is one of great importance to an accurate conception of the whole doctrine — that the existing legal relief to which the plaintiff who invokes the aid of equity is already entitled *need not be of the same kind as that which he demands and obtains from a court of equity;* on the contrary, it may be, and often is, an entirely different species of remedy.[d] One example will sufficiently illustrate this most important conclusion. The facts constituting the relations of the parties might be such that the only existing right to legal relief of the single plaintiff against the wrong-doer is that of recovering amounts of damages by successive actions at law; or the only existing right to legal relief of each one of numerous plaintiffs having some common bond of union is that of recovering damages in a separate action at law against the same wrong-doer; while the equitable relief which might be obtained by the single plaintiff in the one case, or by all the plaintiffs united in the other, might include a perpetual injunction, and the rescission, setting aside, and abatement of the entire matter or transaction which caused the injury, or the declaration and establishment of some common right or duty affecting all the parties. The decisions are full of examples illustrating this most important feature of the doctrine.[e]

(d) Indeed, it may be remarked that the cases are comparatively rare where the jurisdiction can be exercised for purely pecuniary relief, or the recovery of specific property. See *post*, § 251½, note (c). The remedy most frequently obtained is injunction; see *post*, § 261, note (b), where the cases are classified according to the remedy obtained.

(e) It is by no means essential that the *parties* with whom the plaintiff seeks to avoid litigation are the same as the parties to the bill; thus, it is frequently a ground of jurisdiction that the plaintiff, by a single injunction suit against state officials, may avoid interminable litigation with members of the community. See Smyth v. Ames, 169 U. S. 466, 517, 518, 18 Sup. Ct. 418; Haverhill Gaslight Co. v. Barker, 109 Fed. 694; *post*, § 274, note (d), and references. Conversely, a single plaintiff may sometimes sue in behalf of a numerous class, although the injury to such plaintiff personally may be nominal; as where a city sued to enjoin breach of a contract made with a gas company on behalf of its inhabitants. Muncie Nat. Gas Co. v. City of Muncie, 160 Ind. 97, 66 N. E. 436, 441.

§ 251.[a] The remaining questions to be considered are: What multiplicity of suits is it which a court of equity will prevent? What party must be harassed, or incommoded, or threatened with numerous litigations, and by whom must such litigation be instituted, in order that a court of equity may take jurisdiction and prevent the inconvenience and wrong by deciding all the matters in one decree? These questions must chiefly belong to cases of the third and fourth classes, as described in a preceding paragraph, where the "multiplicity" to be prevented arises from the fact that many persons claim or are subject to some general right, although their individual interests are separate and distinct. In cases belonging to the first and second classes, where the litigations are necessarily between a single plaintiff and a single defendant, by or against whom all the actions must be brought, there could not generally be any room or opportunity for the questions above stated. It is in the virtual and implicit, though not often express and avowed, answer to these questions that most of the conflict of judicial opinion occurs. It has been laid down as a general proposition, that a court of equity, in a suit by one party against a class of persons, almost always necessarily indefinite in number, claimed to rest upon the jurisdiction to prevent a multiplicity of actions, will not by injunction declare and establish on behalf of the plaintiff a right which is in its nature opposed to and destructive of a public right claimed and enjoyed by the defendants in common with all other members of the community similarly situated; as, for example, an exclusive right of the plaintiff to a public highway, or to a common navigable river, or to a ferry across a river. A reason given for this conclusion is, that such a decree would virtually require the court to enjoin all the inhabitants of the state or country.[1] The true reasons, however, why a court of equity refuses to grant such relief are wholly unconnected with the doctrine of preventing a multiplicty of suits; they rest entirely upon considerations of public policy which would hinder a court of equity from interfering with the enjoyment of rights purely public. Again, in speaking of cases which would fall either in the third or fourth class, where the total controversy is between a single determinate party on the one side, and a number of persons, more or less, on the other, the proposition has been stated in the most general terms, that in order to originate this jurisdiction — namely, a bill of peace by one plaintiff against numerous defendants — it is essential that there be a single claim of right *in all* (i. e., of the defendants) arising out of some *privity* or relationship with the plaintiff. If this be true, it must clearly be requisite also in the class of suits brought by or on behalf of numerous plaintiffs against one defendant.[2] The proposition thus quoted from a text-writer has been main-

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[1] 2 Story's Eq. Jur., § 858; citing Hilton v. Lord Scarborough, 2 Eq. Cas. Abr. 171, pl. 2; Mitford's Eq. Pl., Jeremy's ed., 148. It has also been decided that a court will not interfere on behalf of one or more in-

[a] This section is cited in Macon & C. R. R. Co. v. Gibson, 85 Ga. 1, 11 S. E. 442, 21 Am. St. Rep. 135.

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dividuals when their injury is *public* in its nature, and is only suffered by each one of them in common with all other citizens or members of the community or municipality, because such individuals have *no* cause of action whatever which any court of equity can recognize; their remedy is wholly legislative and governmental. The observations in the text apply with equal force to this class of cases. See Doolittle v. Supervisors, 18 N. Y. 155; Roosevelt v. Draper, 23 N. Y. 318; Sargent v. Ohio & Miss. R. R., 1 Handy, 25, 60; Carpenter v. Mann, 17 Wis. 160; Kittle v. Fremont, 1 Nebr. 329, 337; Craft v. Comm'rs, etc., 5 Kan. 518.

[2] Adams's Equity, 200, 6th Am. ed., 408. After laying down the above general proposition, the author adds, by way of illustration: "A bill of peace, therefore, will not lie against independent tresspassers having no common claim, and no appearance of a common claim, to distinguish them from the rest of the community; as, for example, against several booksellers who have infringed a copyright, or against several persons who, at different times, have obstructed a ferry. For if a bill of peace could be sustained in such a case, the injunction would be against all the people of the kingdom"; citing Dilley v. Doig, 2 Ves. 486; Mitford's Eq. Pl. 147, 148. These particular cases are undoubtedly correct applications of the doctrine; but they clearly do not sustain the broad proposition of this writer, that the claim of right between the single party on the one side, and the class of persons on the other, must arise out of some *privity* existing between all the members of that class as individuals, and the single party on the other side, by or against whom the right is asserted.

tained by some judges; but it seems to be quite irreconcilable, at all events in its broad generality, with numerous well-considered and even leading decisions, both English and American, made by courts of the highest ability, if any ordinary and effective meaning is given to the word "privity." Suits have often been sustained by a single plaintiff against a numerous class of defendants, and by or on behalf of a numerous class of plaintiffs against a single defendant, avowedly on the ground of "preventing a multiplicity of suits," where there was no relation existing between the individual members of the class and their common adversary to which the term "privity" was at all applicable. Of course there must be *some* common relation, some common interest, or some common question, or else the decree of a court of equity, and the relief given by it in the one judicial proceeding, *could not by any possibility avail to prevent the multiplicity of suits* which is the very object of its interference.[b] Finally, it has been stated in a very positive manner in some American decisions, as an essential requisite to the existence or exercise of the jurisdiction to prevent a multiplicity of suits, that the plaintiff who invokes the jurisdiction of equity must himself be the party who would be compelled to resort to numerous actions in order to obtain complete redress, or who would be subjected to numerous actions by his adversary party, unless the court of equity interferes and decides the whole matter, and gives final relief by one decree.[c] As I have already remarked, this proposition may be accepted as actually true in cases belonging to the first and to the second classes, where the controversy is always between two single and determinate parties, and the sole ground for a court of equity to interfere on behalf of either is, that numerous actions at law are or must be brought by one

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(b) Quoted in Hale v. Allinson, 102 Fed. 790, 791; Mengel v. Lehigh Coal & Nav. Co., 24 Pa. Co. Ct. Rep. 152. See the new paragraph following (§ 251½).

(c) See cases collected, *post*, § 267, editor's note.

against the other. But if the same rule were extended as an essential requisite to cases belonging to the third and fourth classes,— and it is in such cases that it has sometimes been applied,— it would at one blow overturn a long line of decisions, both English and American, which have always been regarded as authoritative and leading. On principle, therefore, the rule last above stated cannot be regarded as a universal one, controlling the exercise of the equitable jurisdiction "to prevent a multiplicity of suits."

[§ 251½.* **Jurisdiction not Exercised when That would be Ineffectual; Simplifying of the Issues Essential.**— It seems desirable to further emphasize and illustrate the author's statement that in cases apparently falling within classes third and fourth, where the jurisdiction depends on the multitude of plaintiffs or defendants, "there must be *some* common relation, some common interest, or some common question" in order that the one proceeding in equity may really avail to prevent a multiplicity of suits. The equity suit must result in a *simplification or consolidation of the issues;* if, after the numerous parties are joined, there still remain separate issues to be tried between each of them and the single defendant or plaintiff, nothing has been gained by the court of equity's assuming jurisdiction. In such a case, "while the bill has only one number upon the docket and calls itself a single proceeding, it is in realty a bundle of separate suits, each of which is no doubt similar in character to the others, but rests nevertheless upon the separate and distinct liability of one defendant" [a] in cases resembling those of the fourth class, or upon the separate and distinct claim of one plaintiff, in cases resembling those of the third class. In refusing to entertain these spurious "bills of peace," courts of equity impose no real limitation upon their jurisdiction, which, by its very definition, exists not *because* of multiplicity of suits, but to *avoid* them, when their rules of procedure can avail to that purpose; indeed, they merely apply to bills of this character the ordinary rules of equity pleading relating to multifariousness.[b]

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* The following new paragraphs, §§ 251½ and 251¾, may well be postponed, in a consecutive reading of this chapter, until § 265 is reached. They are inserted in this place because the principle of § 251½ is more clearly recognized in § 251 than elsewhere in the author's text.

(a) Tompkins v. Craig, 93 Fed. 885, 2 Ames Cas. Eq. Jur. 87, by McPherson, D. J. The very recent case of Hale v. Allinson, 188 U. S. 56, 23

Sup. Ct. 244, 250–254, affirming 106 Fed. 258 (C. C. A.), and 102 Fed. 790, and the opinions therein of Mr. Justice Peckham and of McPherson, D. J., present this matter in the clearest light. See *post*, note (f). While fully recognizing the principle of jurisdiction contended for by the author, Mr. Justice Peckham observes: "To say whether a particular case comes within the principle is sometimes a much more difficult task. Each case, if not brought directly within the principle of some preceding case, must, as we think, be decided upon its own merits and upon a survey of the real and substantial convenience of all parties, the adequacy of the legal remedy, the situations of the different parties, the points to be contested, and the result which would follow if jurisdiction should be assumed or denied; these various matters being factors to be taken into consideration upon the question of equitable jurisdiction on this ground, and whether within reasonable and fair grounds the suit is calculated to be in truth one which will practically prevent a multiplicity of litigation, and will be an actual convenience to all parties, and will not unreasonably overlook or obstruct the material interests of any. The single fact that a multiplicity of suits may be prevented by this assumption of jurisdiction is not in all cases enough to sustain it. It might be that the exercise of equitable jurisdiction on this ground, while preventing a formal multiplicity of suits, would nevertheless be attended with more and deeper inconvenience to the defendants than would be compensated for by the convenience of a single plaintiff; and where the case is not covered by any controlling precedent the inconvenience might constitute good ground for denying jurisdiction. . . . Is there, upon the complainant's theory of this case, any such common interest among these defendants as to the questions of fact that may be put in issue between them and the plaintiff? Each defendant's defense may, and in all probability will, depend upon totally different facts, upon distinct and particular contracts, made at different times, and in establishing a defense, even of like character, different witnesses would probably be required for each defendant, and no defendant has any interest with another."

(b) Lehigh Valley R. R. Co. v. McFarlan, 31 N. J. Eq. 730, 759, 1 Keener's Cas. Eq. Jur. 133. "In this respect there is no difference between such bills [i. e., those in 'causes of purely equitable cognizance'] and bills of peace. A bill of peace which shall draw within equitable cogni-

The following cases may serve to illustrate under what circumstances the court will decline to exercise its jurisdiction because it would prove ineffective to avoid a multiplicity of suits. (1) *Cases where the plaintiffs were numerous* and sought to join. The plaintiffs, twelve in number, had by one contract assigned to the defendants their interests in an option for the purchase of a mine, in consideration of the defendants' promise to refund to each the amount previously advanced by him for the purpose of developing the mine. The plaintiffs joined in one suit to recover these separate amounts. Obviously, the case was not one of equitable cognizance, since the issues between each plaintiff and the defendants were, though similar, entirely distinct and, save as they grew out of the same transaction, unconnected.[c]

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zance causes of action which are purely legal in their character, must conform to the rules and principles of ordinary equity pleading. . . . In such cases there must be such a unity of interest on the one side or the other, as would justify a joinder of the parties in causes of purely equitable cognizance."

The very common misconception of the objects that may be attained by a "bill of peace," to the correction of which the present § 251½ is addressed, appears to be nearly as ancient as the jurisdiction itself; as witness the amusing instance recorded in 2 Ames Cas. Eq. Jur., p. 88, note. "In a note to Best v. Drake, 11 Hare, 371, the reporter reproduces the following extraordinary bill of peace, in the time of Lord Nottingham, given in the Diary of Narcissus Luttrell: 'A bill in Chancery was this term preferred by a widow against 500 persons, to answear what moneys they ow'd her husband; the bill was above 3000 sheets of paper, to the wonder of most people; but the Lord Chancellor looking on it as vexatious, for it would cost each Defendant a 100*l.* the copyeing out, he dismissed the bill, and ordered Mr. *Newman*, the councellour, whose hand was to it, to pay the Defendants the charges they have been att.'"

[c] Van Auken v. Dammeier, 27 Oreg. 150, 40 Pac. 89. Bean, C. J., recognizing the principles laid down in the present chapter, says, in part: "The rights of the plaintiffs, as against the defendants, are purely legal, and wholly separate and distinct. There is no community of interest among them either in the subject-matter of the suit, or in the relief sought. . . . Where the rights of the several plaintiffs are purely legal, and in themselves perfectly distinct, so that each party's case depends upon its own peculiar circumstances, and the relief demanded is a separate money judgment in favor of each plaintiff and against the defendant, there is no 'practical necessity' for the interposition of a court of equity, and we can find no authority for holding that it will assume jurisdiction simply because the parties are numerous." Indeed, cases of classes third and fourth

Several complainants, owners of property of the same character, which they asserted to be not subject to assessment for taxes, joined in a suit to enjoin the collection of taxes levied thereon, claiming as the ground of jurisdiction the avoidance of a multiplicity of suits. There was no complaint that the tax as a whole was not legal, and the complainants did not sue as representatives of all the property-owners of the community.[d] "A, upon being sued in ejectment for a parcel of land to which he claims to have the legal title, or which he claims the legal right to hold against the plaintiff," cannot "maintain a bill to enjoin the action at law, and have his legal title or defense adjudged and his possession conserved thereunder, solely upon the ground that B, C, D, E, and F, are also being sued by the same plaintiff for other and distinct parcels of land which the plaintiff claims under the same chain of title that he relies on against A."[e]

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where the jurisdiction can be successfully invoked for purely pecuniary relief, while not unknown (see *post*, § 261, note (b), "Class Third," (I) (f); "Class Fourth," (I) (h)), are necessarily rare. It has even been held that plaintiffs who may join to restrain a nuisance common to them all cannot in the same suit recover damages for their respective injuries. Barham v. Hostetter, 67 Cal. 272, 7 Pac. 689; Foreman v. Boyle, 88 Cal. 290, 26 Pac. 94; Geurkink v. Petaluma, 112 Cal. 306, 44 Pac. 570; Younkin v. Milwaukee Co., 112 Wis. 15, 87 N. W. 861. (*Query*, why is this not an instance for the application of the familiar principle that in case of injunction against a private nuisance the cause may be retained for the purpose of awarding damages? See *ante*, § 237. The rule against multifariousness surely does not require that all the parties should be interested in *all* the matters set forth in the bill. In State v. Sunapee Dam Co. (N. H.), 55 Atl. 899, a case of this character, the court was evenly divided on the question of jurisdiction to award damages to the numerous plaintiffs in *lieu* of injunction, but the jurisdiction to award them in *addition* to equitable relief appears to have been unquestioned).

(d) Schulenberg-Boeckeler Lumber Co. v. Town of Hayward, 20 Fed. 422, 424. "Each complainant must make his own case upon the facts. One might succeed and another fail. I know of no case, and have been referred to none, in which persons so severally interested have been permitted to join in either a legal or equitable suit, and to allow it would be to confound the established order of judicial proceeding, and lead to interminable confusion and embarrassment."

(e) Turner v. City of Mobile, 135 Ala. 73, 33 South. 133, 141–143. McClellan, C. J., carefully analyzes the

(2) *Cases where the plaintiff sought to join numerous defendants.* A bill was filed to collect the amounts previously assessed against the stockholders of a corporation under a statute making them severally and individually

author's definition of the "third class" in § 245, and his groups of cases illustrating that class in § 273, and shows that the case in hand falls neither within any of these groups nor within the principle underlying them. "The community idea, so to speak, in each of them, lies in two facts, which are absent in the case before us. In the first place, the wrong done to the 'numerous persons' of the text is one and the same wrong against them all, affecting each precisely alike. Here, assuming that the institution of an action of ejectment to which a defense is developed is a wrong, and that it is a wrong to bring thirty or more such actions, there can be no pretense that the institution of thirty or more separate suits against thirty or more separate parties for thirty or more distinct lots of land is one wrong, or that the institution of the one suit sought here to be enjoined was a wrong against and common to each and all the defendants, in the twenty-nine or more separate and distinct actions. In the next place, in each of the cases put in the last four clauses of the section [§ 273, *post*] a decree in favor of one or more of the parties against all [of] whom the one wrong was committed and all [of] whom it injures in the same way would necessarily and directly inure to the benefit of all said persons. Thus, a decree at the suit of A canceling a conveyance as a fraud on creditors as effectually removes and destroys the conveyance as an impediment in the way of creditors B, C, and D as if they had been parties complainant with A in the bill. . . . Of course, in such cases all may join in a bill, or one may exhibit it on behalf of himself and the others or on his own behalf alone, for that in either case the result to them all is the same — relief to all of them from the consequences of the wrong that was done to all of them. But not so in the case here. To enjoin the city of Mobile to prosecute its action against A would not be to enjoin it to prosecute its other and distinct several actions against twenty-nine or more other persons who are not parties to this suit, and might never be, even if the suit is allowed to continue, and in whose favor no relief whatever has been or could be prayed by A. . . . A decree for these complainants would not bind either the plaintiff or the defendant in any of the other suits. It would not put an end to any one of them, nor prevent the city of Mobile instituting any number of other like suits, and having a separate trial in each. The decree, in short, *would not prevent the multiplicity of suits* alleged to be pending or imminent." McClellan, C. J., distinguished the often cited decision of Mr. Justice Harlan, in Osborne v. Railroad Co., 43 Fed. 824 (for which see *post*, at beginning of editor's note to § 261), a very similar case, on the grounds that there "all the ejectment defendants in whose behalf relief was sought were actual complainants in the bill," and "the legal title of each of the complainants had, in effect, been adjudged and settled at law." (The latter statement, however, appears to have been true of only a portion of the complainants in the Osborne case.) The *decision* of liable for its debts to an amount equal to the value of their respective shares. While an inquiry to determine how large the assessment should be should properly be made in equity, "after the rate of assessment has been fixed, and the in-

this able court is plainly correct, and not at variance with any propotion advanced by the author. When the jurisdiction is invoked because of *separate* wrongs, each involving the same question of law and fact, it is plain that the individuals severally affected must usually be made parties to the bill, in order that the relief awarded may be effectual to prevent a multiplicity of suits. The court appears to have gone too far, however, if it attempts to assert, as a test of the jurisdiction in "class third," the existence of a *single* wrong, having a common effect upon the numerous persons, and capable of being remedied, as to its effect upon them all, by the suit of a single plaintiff in his own behalf alone. While in cases where the wrongs are separate, though similar, there is great danger that the joint suit of the persons severally injured may fall within the condemnation of the principle explained in this section, viz., that the issues as to each plaintiff will remain as separate in the single equity suit as in the numerous legal actions — yet the instances are numerous where such suits have been successful; see *post*, § 261, first part of editor's note, for illustrations; also § 269, and note 1.

In Sullivan Timber Co. v. City of Mobile, 110 Fed. 186, which was apparently a part of the same litigation, the court likewise refused to sustain jurisdiction because it did not appear that the issues between the defendant and each of the plaintiffs depended upon the same questions of law or fact.

See also the following cases, where each of the complainants might have been entitled to *equitable* relief, but their joinder was held improper. Purchasers of distinct parcels of land, by separate contracts, made at different times, cannot join in a suit against their common vendor to compel conveyance (Winslow v. Jenness, 64 Mich. 84, 30 N. W. 905) or reformation (Hendrickson v. Wallace, 31 N. J. Eq. 604). Neither plaintiff has the slightest interest in, or connection with, the contract of the other. "The only respect in which it can be said that they have the same interest is, that their positions are similar. They each happen to have a right of action against the same person, for causes almost identical in their facts." In Demarest v. Hardman, 34 N. J. Eq. 472, it was held that several persons owning distinct parcels of land, or occupying different dwellings, and having no common interest, cannot join in an action to restrain a nuisance caused by the vibration of machinery in defendant's building, in consequence of the special injury to the particular property of each. The case seems a somewhat extreme application of the rule. For an admirable illustration, see Marselis v. Morris Canal Co., 1 N. J. Eq. 31, *post*, note to § 264, and the author's explanations and comments (distinct but similar trespasses by the same defendant).

The question may also arise, whether a single plaintiff suing in behalf of a class so represents the class that he may pray for relief in behalf of all persons that constitute it. Thus, in a case where an imdividual liability of each stockholder has thus been ascertained, the enforcement of such liability is the proper subject of a suit at law, in which the separate rights of the defendant stockholders are distinctively to be considered.''[f]

porter of liquors sued to enjoin their seizure by state officials under color of an unconstitutional statute, it was held that he could not obtain relief in behalf of all other citizens of the state who were importers of liquors. "It is, indeed, possible that there may be others in like case with the plaintiff, and that such persons may be numerous, but such a state of facts is too conjectural to furnish a safe basis upon which a court of equity ought to grant an injunction." Scott v. Donald, 165 U. S. 107, 17 Sup. Ct. 262. Compare § 256, note (c), *post.*

(f) Tompkins v. Craig, 93 Fed. 885, 2 Ames Cas. Eq. Jur. 87, by McPherson, D. J. "The liability is legal, and not equitable. It is based upon the stockholder's contract of subscription, an implied term of that contract being the declaration of the statute that a certain contingent liability should follow the subscription. Each contract is a separate obligation, and should be separately enforced. It is plain, also, that each defendant may desire to set up a different defense. One stockholder may have paid his assessment in whole or in part; another may seek to raise the question whether the Iowa court had jurisdiction to make the levy; a third may wish to attack the amount of the assessment; another may aver that his subscription was void from the beginning; and still other defenses, which need not be specified, are readily conceivable. We say nothing about the validity of these defenses. Some of them may not be available, and others may not be successful, but each defendant has the right to make whatever objection he may see fit to raise, in order that it may be passed upon by the court. If the defendants are numerous, as they are in the pending suit, it would be almost, perhaps wholly, impossible to apportion fairly the costs of hearing and of determining many unrelated issues." See also the opinion of the same judge in the similar case of Hale v. Allinson, 102 Fed. 790; affirmed and opinion adopted, 106 Fed. 258 (C. C. A.). Quoting the text, §§ 251, 269, and 274, he says in part: "The receiver's cause of action against each defendant is, no doubt, similar to his cause of action against every other, but this is only part of the matter. The real issue, the actual dispute, can only be known after each defendant has set up his defense, and defenses may vary so widely that no two controversies may be exactly or even nearly alike. If, as is sure to happen, differing defenses are put in by different defendants, the bill evidently becomes a single proceeding only in name. In reality it is a congeries of suits with little relation to each other, except that there is a common plaintiff, who has similar claims against many persons." The decision in Hale v. Allinson was affirmed by the Supreme Court (Hale v. Allinson, 188 U. S. 56, 23 Sup. Ct. 244), and the language of McPherson, D. J., adopted by the court as expressing its own views. For a portion of the opinion of Peckham, J., see *ante*, note (a). See, further, Adams v. Coon, 109 U. S. 380, 3 Sup. Ct. 263; O'Brien v. Fitzgerald, 143 N. Y. 377, 38 N. E. 371; Marsh

A bill was brought to cancel numerous notes held by several defendants, all purporting to have been made by the complainant, and claimed by him to be forgeries. The court, while recognizing the jurisdiction in cases of the "fourth class," says: "It is not enough that the grounds of the invalidity of the several instruments are, as in this case, similar. So far as the instruments sought to be cancelled here, as forged, are concerned, the forgeries are several. The ground of the invalidity of these notes is not a common one within the sense of the cases cited. The character of one of these notes, as to its being forged, has no bearing as to the others. The questions touching the validity of these notes are as several as the holdings. There is, in other words, a multiplicity of issues of facts to be tried, which the jurisdiction invoked cannot avoid or lessen."[g] A party owning and maintaining a dam across a river, under a claim of right so to do, cannot maintain an action in the nature of a bill of peace against two groups of parties, who have brought separate actions against him to recover damages for alleged torts claimed to have been done to them by reason of the dam; one group claiming to be injured by back-water resulting from the maintenance of the dam at an unlawful height; the other claiming to be injured by the diversion of the water. "The causes from which the injuries to the parties respectively resulted, instead of being coincident, are divergent."[h] Persons whose alleged inter-

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v. Kaye, 168 N. Y. 196, 61 N. E. 177, 2 Ames Cas. Eq. Jur. 89. Compare Bailey v. Tillinghast, 99 Fed. 801, 806, 807 (C. C. A.), *post*, note to § 261, Fourth Class, (I), (h), where a common question existed between the receiver and each shareholder. In New York Life Ins. Co. v. Beard, 80 Fed. 66, the statutory liability of numerous stockholders was enforced in a single suit, although there appears to have been no such common question; but in this case equity already had jurisdiction to compel payment of unpaid subscriptions, and properly retained jurisdiction for complete relief against each defendant.

(g) Scott v. McFarland, 70 Fed. 280, by Bellinger, D. J.

(h) Lehigh Valley R. R. Co. v. McFarlan, 30 N. J. Eq. 135, 2 Ames Cas. Eq. Jur. 85, 31 N. J. Eq. 730, 754, 759-761, 1 Keener Cas. Eq. Jur. 133, citing ests in lands advertised for sale by an administrator are antagonistic, and who file separate and independent claims thereto, cannot be properly joined as co-defendants to an equitable petition brought by the administrator, praying that the prosecution of the claims be enjoined, and that the conflicting claims of title be adjudicated and settled by the judgment to be rendered upon such petition.[1] A bill alleged that the complainant's agent, without authority, made sales of complainant's crops, and used their proceeds, and that he wrongfully appropriated to his use moneys supplied to him as such agent, and joined with the agent as defendants the persons to whom he had so disposed of the

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and commenting on Sheffield Water Works v. Yeomans, L. R. 2 Ch. App. 8; New York & N. H. R. R. Co. v. Schuyler, 17 N. Y. 592; Fellows v. Fellows, 4 Cow. 682, 15 Am. Dec. 412; Bouverie v. Prentice, 1 Bro. C. C. 200; Dilly v. Doig, 2 Ves. 486; Rayner v. Julian, 2 Dick. 677; Whaley v. Dawson, 2 Schoales & L. 367, and many other cases. See quotation from the opinion of Depue, J., *ante*, note (b). "To justify a bill of peace, therefore, there must be in dispute a general right in the complainant, in which the defendants are interested, of such a character that its existence may be finally determined in a single issue. It is not indispensable that the defendants should have a co-extensive common interest in the right in dispute, or that each should have acquired his interest in the same manner, or at the same time, but there must be a general right in the complainant, in which the defendants have a common interest, which may be established against all who controvert it, by a single issue."

(i) Webb v. Parks, 110 Ga. 639, 36 S. E. 70. Lumpkin, P. J., after distinguishing the case of Smith v. Dobbins, 87 Ga. 303, 13 S. E. 496, which well illustrates the author's "fourth class," continues, in the picturesque language characteristic of his court: "When, however, a number of persons are at variance among themselves as to their alleged rights with respect to particular property, each claiming antagonistically to all the others, and there is no 'community of interest among them in the questions of law and fact involved in the general controversy, or in the kind and form of relief which they, respectively, and each for himself, demand,' equity will not compel them to consolidate and engage in a pell-mell struggle. In other words, if we may borrow a warlike illustration, it would not be just or fair to constrain soldiers at enmity with each other to fight side by side against a common foe, nor to allow the latter the advantage of having the attention of the adversaries diverted from attacks they might successfully make upon him by pressing distractions and causes of quarrel among themselves." See also, to the same effect, Portwood v. Huntress, 113 Ga. 815, 39 S. E. 299.

property, alleging its conversion by them, and that to sue them all would require a great multiplicity of suits. The matters relied on for relief against these defendants, therefore, depended on unconnected tortious acts.[j]

§ 251¾. **There Must be a Practical Necessity for the Exercise of the Jurisdiction.**— Since the existence or exercise of the jurisdiction, in classes third and fourth, depends on defects in the legal rules as to joinder of parties, where the legal remedy is not thus defective, but permits the joinder of the numerous parties or consolidation of the numerous suits, equity will not take jurisdiction for the purpose of awarding substantially the same relief that may be obtained at law.[a] Again, it has been held that, if danger of vexatious suits by the same party or numerous parties is the ground

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(j) Jones v. Hardy, 127 Ala. 221, 28 South. 564, 2 Ames Cas. Eq. Jur. 91. "To settle several controversies in a single suit, and thereby prevent a multiplication of suits, equity will assume jurisdiction under a variety of circumstances, but it will never interfere to forestall legal remedies when the causes of suit are entirely separate and distinct from each other and depend for their adjustment on no common or connected right, relation, or necessity. When the jurisdiction is invoked by a single complainant against several to whom his interest is separately opposed, he must show that the interests of the defendants are related to each other as being connected with, or convergent in, the property right or question involved in the suit. Pom. Eq. Jur., § 274."

For further illustrations, see Scott v. Erie R. R. Co., 34 N. J. Eq. 354; Buffalo Chemical Works v. Bank of Commerce, 79 Hun, 93, 29 N. Y. Supp. 663; National Union Bank v. London & R. P. Bank, 37 N. Y. Supp. 741, 2 App. Div. 208; Kirwan v. Murphy, 189 U. S. 35, 23 Sup. Ct. 599; Ducktown Sulphur, Copper & Iron Co. v. Fain, 109 Tenn. 56, 70 S. W. 813.

(a) As where adequate relief may be obtained by joining the numerous defendants or plaintiffs in an action of ejectment: Smythe v. New Orleans C. & B. Co., 34 Fed. 825; Northern Pac. R. R. Co. v. Amacker, 46 Fed. 233, 49 Fed. 529, 1 C. C. A. 345, 7 U. S. App. 33; McGuire v. Pensacola City Co., 105 Fed. 677, 44 C. C. A. 670; City of San Francisco v. Beideman, 17 Cal. 461; Burroughs v. Cutter, 98 Me. 178, 56 Atl. 649. See also Manchester Fire Assur. Co. v. Stockton C. H. & A. Works, 38 Fed. 378; Myers v. Sierra Val. S. & A. Assn., 122 Cal. 669, 55 Pac. 689 (by statute, all stockholders may be joined in suit at law to enforce their individual liability); Imperial Fire Ins. Co. v. Gunning, 81 Ill. 236 (injunction sought against numerous garnishments; complainant has adequate remedy by consolidating the garnishment suits).

of jurisdiction alleged by the single complainant, he must show more than a mere possibility of such litigation; the danger to which he is exposed must be a real one.[b]]

§ 252. Examination of the Doctrine upon Authority — First Class.[a]— I shall now examine the nature, extent, and limitations of the general doctrine upon authority. The cases belonging to the first class of the arrangement made

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(b) See Town of Venice v. Woodruff, 62 N. Y. 462, 20 Am. Rep. 495, as explained in Town of Springport v. Teutonia Sav. Bank, 75 N. Y. 397, 401 (the numerous instruments sought to be canceled did not create even a *prima facie* liability); Farmington Village Corporation v. Sandy R. Nat. Bank, 85 Me. 46, 26 Atl. 965 (a similar case: "The evil complained of is based more upon fear than reality. No vexatious litigation by any of these respondents has been shown. No evidence has been adduced of threats, even, of vexatious suits. The mere allegation of a belief that the holders intend to harass the complainant is not sufficient"); Fellows v. Spaulding, 141 Mass. 92, 6 N. E. 548 (against numerous creditors attempting to prove their claims against the plaintiff in a court of insolvency: "The same questions of law are raised in each case, and there is no reason why one suit in the usual course of proceedings in insolvency, the others being continued to abide the result, should not settle all the cases"); Andel v. Starkel, 192 Ill. 206, 61 N. E. 356 (no suits threatened save the one actually brought); Nash v. McCathern, 183 Mass. 345, 67 N. E. 323 (all defendants save one disclaim any intention of suing plaintiff); Kellett v. Ida Clayton & G. W. W. R. Co., 99 Cal. 210, 33 Pac. 885. See also Equitable Guarantee & T. Co. v. Donahue (Del.), 45 Atl. 583, *post*, note to § 266. It has been held that two suits against the plaintiff do not constitute a "multiplicity" of suits. Druon v. Sullivan, 66 Vt. 609, 30 Atl. 98. In Pacific Exp. Co. v. Seibert, 44 Fed. 310, a case of the "second class," to enjoin the collection of taxes, the court said: "It is real and not imaginary suits, it is probable and not possible danger of multiplicity of suits, that will warrant the assumption of jurisdiction on that ground. While it is true, as the plaintiff contends, that the state might bring a separate suit for each day's penalty, the court would hardly be justified in acting on the assumption that it would do so. . . Whatever the rule may be in the case of natural persons, the court will presume that a state is incapable of such a vulgar passion, and, until the fact is shown to be otherwise, will act on the assumption that a state will not bring any more suits than are fairly necessary to establish and maintain its rights."

(a) This section is cited in Preteca v. Maxwell Land Grant Co. (C. C. A.), 50 Fed. 674. Sections 252–260 are cited in Crawford County v. Hathaway (Nebr.), 93 N. W. 781, 796.

in a preceding paragraph,[1] where a court of equity interferes because the plaintiff would be obliged to bring a succession, perhaps an indefinite number, of actions at law in order to obtain relief appearing even to be sufficient have generally been cases of nuisance, waste, trespass to land, disputed boundaries involving acts of trespass by the defendant, and the like, the wrong complained of being in its very nature continuous. If the plaintiff's title to the subject-matter affected by the wrong is admitted, a court of equity will exercise its jurisdiction at once, and will grant full relief to the plaintiff, without compelling him to resort to a prior action at law. Whenever the plaintiff's title is disputed, the rule is settled that he must, in general, procure his title to be satisfactorily determined by at least one verdict in his own favor, by at least one successful trial at law, before a court of equity will interfere; but the rule no longer requires any particular number of actions or trials. The reason for this requisite is, that courts of equity will not, in general, try disputed legal titles to land. But the rule is one of expediency and policy, rather than an essential condition and basis of the equitable jurisdiction.[2] [b] In addition to these ordinary cases of nuisance and similar *continuous* wrongs to property, there are some other special instances in which a court of equity has interfered and determined the entire controversy by one decree, in order to prevent a multiplicity of suits, where otherwise the plaintiff would be compelled to bring several actions at law

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[1] See *ante*, § 245.

[2] Hanson v. Gardiner, 7 Ves. 305, 309, 310; Livingston v. Livingston, 6 Johns. Ch. 497, 500, 10 Am. Dec. 353; Parker v. Winnipiseogee, etc., Co., 2 Black, 545, 551; Hacker v. Barton, 84 Ill. 313; Carlisle v. Cooper, 21 N. J. Eq. 576, 579; Corning v. Troy Iron Factory, 39 Barb. 311, 327, 34 Barb. 485, 492, 493; Webb v. Portland Mfg. Co., 3 Sum. 189; Lyon v. McLaughlin, 32 Vt. 423, 425, 426; Sheetz's Appeal, 35 Pa. St. 88, 95; Holsman v. Boiling

(b) This section is cited, to the effect that title must be first established at law, in Carney v. Hadley, 32 Fla. 344, 14 South. 4, 37 Am. St. Rep. 101, 22 L. R. A. 233; Wabash R. Co. v. Engleman, 160 Ind. 329, 66 N. E. 892; Bowling v. Crook, 104 Ala. 130, 16 South. 131; Kennedy v. Elliott, 85 Fed. 832. The following cases are illustrations of relief against continuing trespasses: Carney v. Hadley, 32 Fla. 344, 14 South. 4, 37 Am. St. Rep. 101, 22 L. R. A. 233; Nichols v. Jones, 19 Fed. 855; Blondell v. Consolidated Gas Co., 89 Md. 732, 43 Atl. 817, 46 L. R. A. 187; Boston & M. R. R. Co. v. Sullivan, 177 Mass. 230, 58 N. E. 689; Davis v. Frankenlust Tp., 118 Mich. 494, 76 N. W. 1045; Warren Mills v. N. O. Seed Co., 65 Miss. 391, 4 South. 298; Birmingham Traction Co. v. S. B. T. & T. Co., 119 Ala. 144, 24 South. 731; Golden v. Health

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Spring Co., 14 N. J. Eq. 335; Sheldon v. Rockwell, 9 Wis. 166, 179, 76 Am. Dec. 265 (interfering with easements of water); McRoberts v. Washburne, 10 Minn. 23, 30; Letton v. Goodden, L. R. 2 Eq. 123, 130 (interfering with an exclusive ferry franchise); Eastman v. Amoskeag, etc., Co., 47 N. H. 71, 79, 80. For the limitations on this application of the doctrine, see Hughlett v. Harris, 1 Del. Ch. 349, 352, 12 Am. Dec. 104. In Parker v. Winnipiseogee, etc., Co., 2 Black, 545, 551, the rule was thus stated by Swayne, J.: Equity will restrain a private nuisance by injunction, in order "to prevent oppressive and interminable litigation or a multiplicity of suits, or when the injury is of such a nature that it cannot be adequately compensated by damages at law, or is such, from its continuance or permanent mischief, as must occasion a constantly occurring grievance, which cannot be prevented otherwise than by an injunction." In Eastman v. Amoskeag, etc., Co.., 47 N. H. 71, 79, the court refused to interfere and restrain an alleged private nuisance, because the plaintiff's title was disputed, and had not been established by even one action at law.

Dep't, 47 N. Y. Supp. 623, 21 App. Div. 420; Hahl v. Sugo, 61 N. Y. Supp. 770, 46 App. Div. 632; Olivella v. New York & H. R. Co., 64 N. Y. Supp. 1086, 31 Misc. Rep. 203; Gibbs v. McFadden, 39 Iowa, 371; Ten Eyck v. Sjoburg, 68 Iowa, 625, 27 N. W. 785. But see Roebling v. First Nat. Bank, 30 Fed. 744. For further discussion of this subject, see Pom. Eq. Rem., "Injunction against Trespass."

In the following cases relief was granted against continuing nuisances: Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567; Coatsworth v. Lehigh Val. R. Co., 156 N. Y. 451, 51 N. E. 301, affirming 48 N. Y. Supp. 511, 24 App. Div. 273; Sullivan v. Jones & Laughlin Steel Co. (Pa. St.), 57 Atl. 1065. See, further, Pom. Eq. Rem., "Injunction against Nuisances."

In Nevitt v. Gillespie, 1 How. (Miss.) 108, 26 Am. Dec. 696, a case of waste, the rule was laid down as follows: "A court of equity will not entertain a bill of peace, when the right is controverted by two persons only, until after the right has been established satisfactorily by a trial at law." See also Taylor v. Pearce, 71 Ill. App. 525 (trespass).

In Kellett v. Ida Clayton, etc., Co., 99 Cal. 210, 33 Pac. 885, it was held that a party who by contract claimed a right to pass over a road without paying toll could not enjoin interference with this right until it was established at law.

Although equity will not interfere if the complainant's title be denied, until he has vindicated it at law, it may retain the bill until that has been done. Washburn's Appeal, 105 Pa. St. 480.

against the same adversary, and with respect to the same subject-matter.[3]

§ 253. **Second Class.**— The second class, according to my previous arrangement, consists of two branches. In the first of these the defendant has brought, or threatens to bring, successive actions at law to recover the same subject-matter from the plaintiff, where from the rules of the legal procedure the title is not determined by a judgment in any such action or number of actions. This branch has therefore been ordinarily confined to cases of successive actions of ejectment to recover the same tract of land from the plaintiff. It follows as a matter of course that equity will not interfere on behalf of the plaintiff, and restrain the defendant's proceedings, until the plaintiff's title has been sufficiently established by the decision of at least one action at law in his favor. Indeed, the interference of equity assumes that the plaintiff's legal right and title have been clearly determined, and its sole object is to quiet that title by preventing the continuance of a litigation at law which has become vexatious and oppressive, because it is unnecessary and unavailing. A court of equity will not therefore interfere to restrain the defendant's litigation as long as the plaintiff's title is uncertain.[1] [a] And in analogous cases, not of ejectment, the court will interfere and restrain the defendant's further prosecution of successive actions at law, and will thus establish and quiet the plaintiff's right, when all the questions of law and fact involved in these actions have already been fully determined in the plaintiff's favor by some former judicial proceeding between the same parties.[2]

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[3] Biddle v. Ramsey, 52 Mo. 153, 159, is an example. Plaintiff alleged that he had leased premises to the defendant, and by the lease it was stipulated that near the end of the term each should name an appraiser, and they a third; and that these three appraisers should *unanimously* assess the value of the improvements made by the defendant, and the yearly rental; and that the plaintiff should have an option to buy such improvements at the sum thus fixed, or to grant a new lease to the defendant at the rent thus fixed, etc.; that defendant had by his fraud prevented any unanimous action of the appraisers, and had kept possession of the premises for more than three years after the end of the term without paying any rent. Held, that the suit in equity was proper, in order to give the plaintiff full relief, and to prevent a multiplicity of actions at law; viz., plaintiff would be obliged to bring an action of ejectment to recover possession of the premises, and then other actions to settle questions as to the payment for the buildings and other improvements. I think the correctness of this decision may be doubted. The plaintiff's interest and causes of action were wholly legal, and the relief which he obtained was also purely legal. It is plain, at all events, that the special cases mentioned in the text must be few in number. For a clear statement of the restrictions upon this mode of exercising the equitable jurisdiction to prevent a multiplicity of suits, see Richmond v. Dubuque, etc., R. R. Co., 33 Iowa, 422, 487, 488.[c] Black v. Shreeve, 7 N. J. Eq. 440, 456, 457, is a much more appropriate and instructive example. A very long, peculiar, and complicated agreement had been executed by the plaintiffs and a large number of other persons, by which each agreed to pay a certain contributory share, the amount depending upon many contingencies, towards making up an expected deficiency. The plaintiffs paid the whole, and would necessarily be obliged to maintain numerous and successive actions at law in order to establish their own rights, and to ascertain and recover the amounts payable by the other parties. It was held that, to avoid this multiplicity of actions, the plaintiffs could sue in equity, and have the whole matter settled by one decree. It should be observed that the rights, liabilities, and remedies of all the parties were purely legal, since they were in no sense sureties.[d]

(c) *Post*, in note to § 263.

(d) In Stovall v. McCutchen, 107 Ky. 577, 92 Am. St. Rep. 373, 54 S. W. 969, 47 L. R. A. 287, a number of merchants agreed to close their stores at a certain hour each day. The court held that the recurring breach of the contract would require numerous actions at law, and consequently granted an injunction. For another instance of specific performance of a contract on the ground that it called for a continuous series of acts, see Shimer v. Morris Canal & B. Co., 27

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[1] Leighton v. Leighton, 1 P. Wms. 671; Earl of Bath v. Sherwin, Prec. Ch. 261, 10 Mod. 1, 1 Brown Parl. C., 266, 270, 2 Brown Parl. C., Tomlins's ed., 217; Devonshire v. Newenham, 2 Schoales & L. 208, 209; Weller v. Smeaton, 1 Cox, 102, 1 Brown Ch. 573; Earl of Darlington v. Bowes, 1 Eden, 270, 271, 272; Alexander v. Pendleton, 8 Cranch, 462, 468; Trustees of Huntington v. Nicoll, 3 Johns. 566, 589, 590, 591, 595, 601, 602; Eldridge v. Hill, 2 Johns. Ch. 281; Woods v. Monroe, 17 Mich. 238; Knowles v. Inches, 12 Cal. 212; Patterson v. McCamant, 28 Mo. 210; Bond v. Little, 10 Ga. 395, 400; Harmer v. Gwynne, 5 McLean, 313, 315.

N. J. Eq. 364. On the same ground, specific performance of a contract to pay alimony in certain amounts at fixed periods was enforced in Peterson v. Fleming, 63 Ill. App. 357.

(a) This paragraph is cited in Wehrman v. Conklin, 155 U. S. 314, 15 Sup. Ct. 129; Kennedy v. Elliott, 85 Fed. 832; Gordon v. Jackson, 72 Fed. 86. The text is quoted in Dishong v. Finkbiner, 46 Fed. 12, 16, where many cases are reviewed, and it is held that the defendant in ejectment will not generally be granted relief in equity when his title has been determined in only one action. See also Craft v. Lathrop, 2 Wall. Jr. 103, Fed. Cas. No. 3,318; Pratt v. Kendig, 128 Ill. 293, 21 N. E. 495 (immaterial whether the proceeding in which the right has been established is an action at law or a suit in equity); Marsh v. Reed, 10 Ohio, 347; Caro v. Pensacola City Co., 19 Fla. 766; Holland v. Challen, 110 U. S. 15, 19, 3 Sup. Ct. 495; Sharon

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[2] As in Paterson, etc., R. R. v. Jersey City, 9 N. J. Eq. 434, the city officials had assessed the property of the railroad for taxes, state, county, and city. The railroad brought a writ of *certiorari* to the supreme court, which held that all these taxes were invalid because the corporation was by its charter exempted from all general taxation, and this decision was affirmed by the court of errors. Notwithstanding these decisions, the city afterwards assessed the same kind of taxes again upon the same property of the railroad in two successive years, and was taking the steps provided by law for the collection of these latter taxes by a compulsory sale of the company's property. The railroad thereupon brought this suit in equity for an injunction against the city and its officials. Held, a proper occasion for equity to restrain a multiplicity of suits. If the plaintiff's right has been established by a decision at law, there is no requirement of any particular number of actions at law before a suit in equity can be maintained; one judgment at law may be sufficient.[b]

v. Tucker, 144 U. S. 542, 12 Sup. Ct. 720; Boston & Montana C. C. & S. M. Co. v. Montana Ore P. Co., 188 U. S. 632, 23 Sup. Ct. 434. *Ante*, notes to § 248. In Texas, where the courts are empowered to give such relief as the case may require, whether legal or equitable, it is held that the rules that one will not be quieted in his title until he has established it at law, and that one not in possession cannot maintain an action to remove a cloud from his title, have no application; Thomson v. Locke, 66 Tex. 383, 389, citing the text, §§ 242, 253, 254, 258. In Thompson's Appeal, 107 Pa. St. 559, a married woman in possession of her separate estate was allowed to maintain a bill in equity to restrain repeated actions of ejectment by a purchaser at sheriff's sale of said property, under a judgment against her husband, where such actions were not brought in good faith and were not prosecuted to judgment, but were brought with the alleged purpose of compelling the payment of her husband's debt; and where the actions sought to be restrained are of such a nature that there is no opportunity to determine the title, a bill will lie, without the title having been first determined at law: Langdon v. Templeton, 61 Vt. 119. In Porter v. Reed, 123 Mo. 587, 27 S. W. 351, there had been one verdict only in complainant's favor, but several other actions had been brought against him and abandoned.

(b) After the illegality of a tax has been established at law, equity will restrain future suits to collect. Bank of Kentucky v. Stone, 88 Fed. 383. In Union & Planters' Bank v. Memphis, 111 Fed. 561, 49 C. C. A. 455, the complainant alleged that the right of the defendant to tax its capital stock had been tried and denied. Accordingly, an injunction to prevent future repetitions of the assessment was allowed in order to pre-

§ 254.[a] In the second branch of the same class the single defendant has brought a number of simultaneous actions at law against the plaintiff, all depending upon similar facts and circumstances, and involving the same legal questions, so that the decision of one would virtually be a decision of all the others. A court of equity *may* then interfere and restrain the prosecution of these actions, so that the determination of all the matters at issue between the two parties may be brought within the scope of one judicial proceeding and one decree, and a multiplicity of suits may thereby be prevented. It must be admitted that this exercise of the equitable jurisdiction is somewhat extraordinary, since the rights and interests involved are wholly legal, and the substantial relief given by the court is also purely legal. It may be assumed, therefore, that a court of equity will not exercise jurisdiction on this particular ground, unless its interference is clearly necessary to promote the ends of justice, and to shield the plaintiff from a litigation which is evidently vexatious. It should be carefully observed that a court of equity does not interfere in this class of cases to restrain absolutely and completely any and all trial and decision of the questions presented by the pending actions at law; it only intervenes to prevent the repeated or numerous trials, and to bring the whole within the scope and effect of one judicial investigation and decision. It should also be observed that if the pending actions at law are of such a nature or for such a purpose, that, according to the settled rules of the legal procedure, they may all be consolidated into one, and all tried together by an order of the court in which they or some of them are pending, then a court of equity will not interfere; since the legal remedy of the plaintiff is

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vent a multiplicity of suits. In Siever v. Union Pac. R. Co. (Nebr.), 93 N. W. 943, the institution of successive garnishment proceedings to reach complainant's wages, which had been adjudged to be exempt, was enjoined.

(a) This section is cited in Eureka & K. R. R. Co. v. Cal. & N. R. Co., 109 Fed. 509, 48 C. C. A. 517; Thomson v. Locke, 66 Tex. 383, 389; Galveston, H. & S. A. R'y Co. v. Dowe, 70 Tex. 5, 7 S. W. 368.

complete, certain, and adequate, there is no necessity for his invoking the aid of the equitable jurisdiction.[1] [b]

§ 255. Third and Fourth Classes.— In pursuing this inquiry into the extent and limitations of the doctrine, the third and fourth of my classes may with advantage be considered together. In the third, a number of persons have separate and distinct interests, but still united by *some* common tie, against one determined party, and these in-

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[1] Kensington v. White, 3 Price, 164, 167; Third Avenue R. R. v. Mayor, etc., of N. Y., 54 N. Y. 159, 162, 163; West v. Mayor of N. Y., 10 Paige, 539. In Kensington v. White, 3 Price, 164, defendant had brought five separate actions at law on five different policies of insurance effected on different ships, but between the same parties and at the same time; the defense was substantially the same in all,— fraud of the assured. The complainants (defendants in the five actions), the insurers, then brought this suit in equity, to have all the matters tried in one suit, praying for a discovery, and an injunction against the actions at law. The bill was held proper, in order to avoid a multiplicity of suits, as the whole was really one transaction. In Third Avenue R. R. v. Mayor of N. Y., 54 N. Y. 159, 162, 163, the city had brought seventy-seven actions in a justice's court to recover penalties for violating a city ordinance concerning the running of cars without a license, each action for a separate penalty. All the actions depended upon similar facts and upon the same question of law, viz., whether the railroad was liable under the ordinance; and a decision of one would virtually decide all. The company brought this

(b) The case of Galveston, H. & S. A. R'y Co. v. Dowe, 70 Tex. 5, 7 S. W. 368, was very similar to that of Third Avenue R. R. Co. v. Mayor of N. Y., 54 N. Y. 159, 162, 163. A railroad contractor had issued a number of time-checks, thirty of which, by assignment, had become the property of the defendant. The latter brought separate suits on a large number of these claims in a justice's court, which had no power to consolidate the actions. An injunction was granted against the prosecution of the separate suits, although the plaintiff had not established his right in an action at law. In Norfolk & N. B. Hosiery Co. v. Arnold, 143 N. Y. 265, 38 N. E. 271, the plaintiff at law recovered judgment for royalties. The defendant appealed, whereupon plaintiff threatened successive actions for further installments. The plaintiff was financially irresponsible, and ample security had been given. The court granted an injunction to stay the further suits. Third Avenue R. R. Co. v. Mayor, 54 N. Y. 159, was cited. Featherston v. Carr, 132 N. C. 800, 44 S. E. 592, was a similar case (prosecution of monthly suits for rent, pending appeal from judgment awarding possession of the premises, enjoined). In Cuthbert v. Chauvet, 60 Hun, 577, 14 N. Y. Supp. 385, 20 Civ. Proc. Rep. 391, the plaintiff at law brought ten actions of ejectment simultaneously and depending upon the same facts. An injunction was issued against all the actions but one. Third Avenue R. R. Co. v. Mayor, 54 N. Y. 159, was cited. In Peters v. Prevost, 1 Paine C. C. 64, Fed. Cas. No. 11,032, the complainant sought to enjoin ninety-two simultaneous actions of ejectment. The court held that the actions might be consolidated at law, and refused relief. In Cleland v. Campbell, 78 Ill. App. 624, injunction was refused against the prosecution of twenty-three simultaneous actions at law, until the complainant's right should be established at law.

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suit in equity to restrain the prosecution of all these actions except one, offering to abide the final decision in that one. The suit was sustained, and the relief granted, *because a justice court had no power to consolidate these actions.* The decision was placed expressly upon the power of equity to prevent a multiplicity of suits, and the impossibility of the plaintiff's being relieved in any other manner from a vexatious litigation. The case was held to be distinguishable from West v. Mayor, etc., 10 Paige, 539, in which an apparently contrary decision was made, because in the latter case the plaintiff, West, sought to restrain absolutely all the actions which were pending against him. I would add that some of the language in the chancellor's opinion in West v. Mayor, etc., 10 Paige, 539, goes much further than the distinction thus made, and can hardly be reconciled with the decision of the court of appeals; but the *decision* in West v. Mayor, etc., 10 Paige, 539, is clearly distinguishable. In West v. Mayor, etc., 10 Paige, 539, the city had brought a considerable number of actions against the plaintiff, to recover penalties for alleged violations, all similar in their nature, of a city ordinance. None of these actions had yet been tried. Plaintiff then sued in equity to have *all* these actions enjoined, and to try the whole matter in the single equity suit. Chancellor Walworth held that a court of equity could not interfere, because,— 1. That equity would never assume jurisdiction in a case analogous to the present until the plaintiff had established his right by a successful defense in at least one of the actions; and 2. That equity would never interfere when the whole question was one of law, and if the law was with the plaintiff he would have a perfect defense in each action. Such suits in equity have been sustained where the questions were of fact, or of mixed law and fact; but no bill can be sustained to restrain a defendant from suing at law, where only a question of law is involved, and when the defendant at law (the plaintiff in equity) must finally succeed in his defense if the law is in his favor. It is plain that both of these general grounds adopted by the chancellor are irreconcilable with the subsequent decision by the court of appeals last quoted.[c]

(c) **Injunction against Numerous Prosecutions for Violation of a Municipal Ordinance.**— On the question whether the complainant's right must first be established at law, the recent cases are conflicting. In some jurisdictions, relying, largely, on the authority of West v. Mayor, 10 Paige, 539, successive prosecutions under a municipal ordinance will not be enjoined on the ground of the prevention of a multiplicity of suits, unless the complainant has first established the invalidity of the ordinance by a successful defense in a suit at law. Poyer v. Village of Des Plaines, 123 Ill. 111, 5 Am. St. Rep. 494. See also Chicago, B. & Q. R. R. Co. v. City of Ottawa, 148 Ill. 397, 36 N. E. 85; Yates v. Village of Batavia, 79 Ill. 500; Ewing v. City of Webster City, 103 Iowa, 226, 72 N. W. 511. The majority of the recent decisions, however, appear to be in accord with terests may perhaps be enforced by one equitable suit brought by all the persons joining as co-plaintiffs, or by one suing on behalf of himself and all the others, or even by one suing for himself alone.[a] The fourth is the exact converse of the third. One determined party has a general right against a number of persons, common to all in some of its features, but still affecting each individually, and only with respect to his separate, distinct interests, so that each of these persons has a separate and distinct claim in opposition to the asserted right.[b] It is plain that the same funda-

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the text. Joseph Schlitz Brewing Co. v. City of Superior, 117 Wis. 297, 93 N. W. 1120 (enforcement of void ordinance enjoined though none of the threatened prosecutions had in fact been commenced); Milwaukee El. R. & L. Co. v. Bradley, 108 Wis. 467, 84 N. W. 870. In City of Hutchinson v. Beckham, 118 Fed. 399 (C. C. A.), a suit to enjoin the enforcement of an illegal city ordinance imposing a license tax, Thayer, Cir. J., observes: "Now, conceding that the validity of the ordinance might have been tried in any one of the criminal prosecutions thus brought by the city, yet, as the right of appeal existed from any judgment which might have been rendered therein, it is apparent that months, and possibly some years, might have elapsed before the invalidity of the ordinance would have been definitely established, and that in the meantime the plaintiffs might and probably would have been compelled to defend a multitude of suits, and submit to daily interruptions of their business, which would have proven to be very annoying and probably disastrous." In Sylvester Co. v. St. Louis, 130 Mo. 323, 51 Am. St. Rep. 566, 32 S. W. 649, an adjudication at law of the invalidity of the ordinance was held unnecessary. The court said: "While, under the former system of jurisprudence, in which relief in equity was administered by a different tribunal, and by a different procedure from those that gave relief at law, courts of equity have sometimes refused to interfere before the right was established at law (West v. Mayor, etc., 10 Paige, 539), there seems no good reason, under the present system, in code states, where both are blended, why such relief should not be granted in the first instance by injunction." See also Davis v. Fasig, 128 Ind. 271, 27 N. E. 726; City of Rushville v. Rushville Natural Gas Co., 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321. For further cases on this subject, consult Pomeroy's Eq. Rem., "Injunction against Municipal Corporations." For relief in equity dependent on the fact that the ordinance affects numerous persons, see *post*, § 261, note, Third Class, (I), (b).

[a] This section is cited in Liverpool & L. & G. Ins. Co. v. Clunie, 88 Fed. 160, 167; Washington County v. Williams, 111 Fed. 801, 815, 49 C. C. A. 621, dissenting opinion of Sanborn, Cir. J.; Macon, etc., R. R. Co. v. Gibson, 85 Ga. 1, 21 Am. St. Rep. 135, 11 S. E. 442; Osborne v. Wisconsin Cent. R. Co., 43 Fed. 824, by Harlan, J., all illustrating the author's "third class."

[b] This and the following sections are cited in Smith v. Dobbins, 87 Ga.

mental questions must arise in both of these classes. The first and most important question which meets us is, What must be the character, the essential elements, and the external form of the common right, claim, or interest held by the number of persons against the single party in the third class, and by the single party against the number of persons in the fourth class, in order that a court of equity may acquire or exercise jurisdiction for the purpose of preventing a multiplicity of suits, and may determine the rights of all and give complete relief by one decree? Is it necessary that the common bond, element, or feature should inhere in the very rights, interests, or claims themselves which subsist between the body of persons on the one side and the single party on the other, and should affect the nature and form of those rights, interests, or claims to such an extent that they create some positive and recognized existing legal relation or privity between the individual members of the group of persons, as well as between each of them and the single determined party to whom they all stand in an adversary position? Or is it enough that the common bond or element consists solely in the fact that all the rights, interests, or claims subsisting between the body of persons and the single party have arisen from the same source, from the same event, or the same transaction, and in the fact that they all involve and depend upon similar questions of fact and the same questions of law, so that while the same positive legal relation exists between the single determined party on the one side *and each individual* of the body of persons on the other, no such legal relation exists between the individual members themselves of that body?— as among themselves their respective rights, interests, and claims against the common adversary party, otherwise than above stated, are wholly separate and distinct. This question lies at the foundation

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303, 13 S. E. 496, a case of the "fourth class." This section is cited in Illinois Cent. R. Co. v. Garrison, 81 Miss. 257, 32 South. 996, 95 Am. St. Rep. 469; Kellogg v. Chenango Valley Sav. Bk., 42 N. Y. Supp. 379, 11 App. Div. 458, cases of the "fourth class."

of the whole discussion. Others have been suggested, and have been considered by the courts, but they are all finally resolved into this, and all depend upon its final solution for their answer. It is in the solution of this most important question, and in its application to particular circumstances, that most of the conflict of opinion among the American courts especially has arisen. I shall endeavor to present all these conflicting views briefly but fairly, and to suggest my own opinion concerning their correctness and the weight of authority: to reconcile them all would be simply impossible.

§ 256. **Community of Interest.**[a]— The two leading cases are generally known as "The Case of the Fisheries,"[1] and "The Case of the Duties."[2] The former was a bill to restrain a large number of trespassers, and to establish the plaintiff's right as against them. The corporation had exercised and claimed an exclusive right of fishery over an extent of nine miles in the river Ouse. The defendants were numerous lords of manors and owners of separate tracts of land adjacent to the river, and each claimed, in opposition to the city, an individual right of fishery within the specified limits by virtue of his separate and distinct riparian proprietorship. Lord Hardwicke sustained the bill, although the plaintiff had not established his exclusive title by any action at law, and although the claims of the various defendants were thus wholly distinct, and expressly placed his decision upon the equitable jurisdiction to prevent a multiplicity of suits, since otherwise the corporation would be obliged to bring endless actions at law against the individual trespassers. The second case was brought to establish the right of the city of London to a duty payable by all merchants importing a certain article of merchandise. It has ordinarily been quoted and treated as though it was a bill filed by the city against a number of individual importers separately engaged in the trade, for the purpose of establishing and enforcing the city's common right to the duty or tax in question. An examination of the record shows that this is not an accurate account of the proceeding; but still the case has generally been regarded as an important authority in support of the equity jurisdiction under the circumstances described, and such seems to have been the view taken of it by Lord Hardwicke in deciding the Fisheries Case. There are other English decisions to the same effect, depending upon strictly analogous facts, and involving the same doctrine, which are referred to in the foot-note.[3] There is an opinion of Lord Redesdale in the case of Whaley v. Dawson, which has sometimes been quoted as though it were intended to furnish the true rule concerning the nature of the common interests and common relations which must subsist among the individual members of the numerous body of persons in the two classes of cases

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[1] Mayor of York v. Pilkington, 1 Atk. 282.

[2] City of London v. Perkins, 3 Brown Parl. C., Tomlins's ed., 602.

(a) This paragraph of the text is cited in United States v. Southern Pac. R. Co., 117 Fed. 544, a suit of the "fourth class."

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[3] Lord Tenham v. Herbert, 2 Atk. 483, per Lord Hardwicke (see the passage from his opinion quoted *ante*, in note to § 247); How v. Tenants of Bromsgrove, 1 Vern. 22, a suit by the lord of a manor to establish a right of free warren against the tenants of his manor; Ewelme Hospital v. Corp'n of Andover, 1 Vern. 266, a suit to establish the right to hold a fair at a particular place, and to have certain profits and dues from persons trading at such fair; Cowper v. Clerk, 3 P. Wms. 155, 157, a bill filed by a single copy-holder against the lord of the manor, to be relieved from an excessive fine. Lord Chancellor King held that a bill by a single copy-holder could not be sustained, because the defense of an excessive fine would be admitted in an action at law brought against him by the lord. But the chancellor added that a bill would lie *by several copy-holders to be relieved from a general fine*, on the ground of its being excessive, in order to prevent a multiplicity of suits. This case, in my opinion, is extremely important in the extent to which it carries the operation of the doctrine. In Weale v. West Middlesex Water Co., 1 Jacob & W. 358, 369, there is a very important opinion of Lord Chancellor Eldon concerning the operation of the doctrine in these classes of cases. The defendant was required by its charter to furnish water to the inhabitants of a specified district at reasonable rates. The defendant had raised its rates, and the plaintiff, who had been a customer, filed a bill to compel the company to keep on furnishing water at the old rates, and to restrain it from cutting off the water supply, etc. Lord Eldon said (p. 369): In Mayor of York v. Pilkington, 1 Atk. 282, the plaintiff had an exclusive right of fishery in a certain river; many persons claimed that *they* had a right; and the corporation sued to establish its own exclusive right; and it was held that the bill was proper, because if the corporation showed itself to have an exclusive right, the rights of no other individual persons could stand. "If any person has a common right against a great many of the king's subjects, inasmuch as he cannot contend with all the king's subjects, a court of equity will permit him to file a bill against some of them, taking care to bring so many persons before the court that their interests shall be such as lead to a fair and honest support of the public interests; and

when a decree has been obtained, then the court will carry the benefit of it into execution against other individuals, who were not parties. . . . This would be more like that case if it were the direct converse of what it is; because it is impossible in the nature of the thing that Weale (the plaintiff) can maintain a suit on behalf of himself and other inhabitants of the district; he can only come into court on the footing of his own independent right." See also Bouverie v. Prentice, 1 Brown Ch. 200; and Ward v. Duke of Northumberland, 2 Anstr. 469; Arthington v. Fawkes, 2 Vern. 356. The doctrine was applied under analogous circumstances in the very recent cases of Sheffield Water Works v. Yeomans, L. R. 2 Ch. 8, 11, and Phillips v. Hudson, L. R. 2 Ch. 243, 246. The first of these cases is a very strong one. A reservoir of the water company had burst, and damaged a large number of persons. Under a special statute, commissioners were appointed to examine the claims of all these persons, and to give a certificate to each one whose claim was satisfactorily proved. Each certificate would be *prima facie* a legal demand against the company for the amount of damage certified in it; but to enforce such certificate, each holder must bring an action at law. The commissioners issued a large number of certificates, and among them a certain class, fifteen hundred in number, which the company claimed to be illegal. To avoid the multiplicity of actions against itself on these certificates, the company brought this suit in equity against certain of the holders sued on behalf of all the others, praying to have the certificates adjudged invalid, and canceled. Here was no community of right or of interest in the subject-matter among these fifteen hundred certificate holders. In the form in which their demands existed, they did not all arise from the one wrongful act of the water company. Each holder's demand and separate right arose solely from the dealings of the commissioners with him individually. The only community of interest among them was in the question of law at issue upon which all their rights depended, and in the same remedy to which each might be entitled. The suit was sustained on demurrer first by Kindersly, V. C., and on appeal by Chelmsford, L. C. The latter said: "Strictly speaking, this is not a bill of peace, as the rights of the claimants under the alleged certificates are not identical; but it appears to me to be within the principle of bills of this description. The rights of the numerous claimants (certificate holders) *all depend upon the same question*. . . . It seems to me to be a very fit case, by analogy, at least, to a bill of peace, for a court of equity to interpose and prevent unnecessary litigation," etc. This case has a strong resemblance in its circumstances, object, and principle to the celebrated suit growing out of the Schuyler fraud, described under a subsequent paragraph. It certainly cannot be reconciled with the theory, maintained by some of the American courts, that there must be a common interest in the subject-matter, or a common title among the numerous body now under consideration.[4] It is very evident, however, that Lord Redesdale is not alluding to, nor even contemplating, in this decision, any kind of case in which equity assumes jurisdiction to prevent a multiplicity of suits; he is merely discussing the familiar objection of multifariousness, where the plaintiff has united two entirely separate subject-matters and defendants in the suit over which equity had an undoubted and exclusive jurisdiction. The other English decisions very clearly do not require any *privity* between the members of the numerous body, nor any common ele-

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of claimants, in order that a court of equity may interfere by such a suit. In Phillips v. Hudson, L. R. 2 Ch. 243, 246, Lord Chancellor Chelmsford decided that a suit will lie by one copyholder suing on behalf of himself and the others, against the lord of a manor, to establish their rights of common in the manor; but such a suit cannot be maintained by a single copyholder suing alone.[a] See the very recent and instructive case of Board of Supervisors v. Deyoe, 77 N. Y. 219, 225.[b]

[4] Whaley v. Dawson, 2 Schoales & L. 367, 370. This was a suit praying partition of certain lands against the defendant D., and also alleging that by fraud the defendant C. had obtained from the plaintiff a lease of a certain part of said land, and praying, as against the defendant C., that such lease might be set aside. This bill was demurred to on the ground of multifariousness, and the demurrer was sustained. Lord Redesdale said (p. 370): "In the cases where demurrers on the ground that plaintiff demanded by his bill matters of distinct natures against several defendants not connected in interest have been overruled, there has been a general right in the plaintiff covering the whole case, although the rights of the defendant may have been distinct. But I take it that where the subjects of the suit are in themselves perfectly distinct, there is a common ground of demurrer." Even if this opinion can be regarded as having any reference to the cases under consideration, in which a court of equity may exercise jurisdiction in order to prevent a multiplicity of suits, it very plainly does not place any practical limit to the operation of the doctrine; it does not in the least ascertain and fix the common nature of the interests or relations which must subsist among the body of persons, or between them individually and their single adversary. See also Bouverie v. Prentice, 1 Brown Ch. 200; Ward v. Duke of Northumberland, 2 Anstr. 469.

(a) See also the similar case of Smith v. Brownlow, L. R. 9 Eq. 241.

(b) A bill in the nature of a bill of peace may be brought by a single plaintiff, claiming rights in the waters of a stream against numerous defendants, to determine and define conflicting rights to or claims upon the waters of the same stream; Crawford Co. v. Hathaway, (Nebr.) 93 N. W. 781, 796. For other analogous cases see *post*, § 261, note.

ment or feature inhering in the very nature of their individual interests as between themselves.[5] [c]

§ 257. **Distinct Proprietors Injured by One Wrong.**[a]— There is another important group of cases, presenting on their face a very different condition of facts, which illustrate the question as to the community of interests which must subsist among the individuals of a numerous body of persons in opposition to a single party, in order that a court of equity may take jurisdiction, and grant them relief upon the ground of preventing a multiplicity of suits. These are the cases in which a number of individual proprietors of separate and distinct parcels of land have all been interfered with and injured in the same general manner, with respect to their particular lands, by a private nuisance, so that they all have a similar claim for legal redress against the author of the nuisances. As, for example, where a number of different owners have separate mills and water-powers along the banks of a stream, and some party wrongfully erects a dam or diverts the water, and by this unlawful act the property rights of each owner are injuriously affected in the same general manner, although in unequal amounts. The instances are numerous in which courts of equity have interfered, under these and analogous circumstances, avowedly on the ground of preventing a multiplicity of suits, and have given complete relief to all the injured proprietors by a single decree.[1] [b] The cases of this group are exceedingly important in their bearing upon the question under examination as to the true meaning and extent of the doctrine concerning the prevention of a multiplicity of suits. At law, the only remedy was an action for damages by each owner against the author of the nuisance or trespass. It cannot be pretended that there existed among the various owners with respect to each other, or as between their entire body and the defendant, any common bond or interest to which the term " privity " can be applied, or which bore the slightest resemblance to any species of privity. In fact, there did not exist among them as individual owners, or between them as a body and the defendant, any distinct legal relation whatever which the law recognizes. The only common bond among them as individuals, or between them as a body and the defendant, consisted in the fact that they each and all

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[5] There is a marked distinction between the case of Weale v. West Middlesex Water Co., 1 Jacob & W. 358, 369, and the Fisheries Case and others quoted in the preceding notes. There was no common right of any kind among the water consumers of the district and the company. It is true, the company was bound by charter to supply all who wished the water and paid the rates; but the immediate basis of the supply in each individual case, and the only legal relation between each consumer and the company, was a distinct, separate, voluntary contract made between such consumer and the company. Each consumer stood upon his own distinct contract as the single source of his right. There was no sort of community of interest among the consumers of the district; their rights were not only separate, but did not arise from the same legal cause, or event, or transaction; nor did they depend upon the same questions of law or of fact. Very plainly, therefore, they were not in such a position that they could all join as co-plaintiffs in a suit against the company; nor could Weale sue on behalf of the others.

(c) The recent case of Duke of Bedford v. Ellis, [1901] App. Cas. (H. of L.) 1, affirming Ellis v. Duke of Bedford, [1899] 1 Ch. 494, is of importance as defining the right of one person to sue as representative of a class. There, several persons sued on behalf of all "growers" of fruit, etc., to enforce preferential rights which they claimed under statutes, to stands in Covent Garden Market, seeking a declaration of their rights, and an injunction against their infringement. It was declared (pp. 8, 10) that Order XVI, Rule 9, to the effect that "where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued . . . in such cause or matter on behalf or for the benefit of all persons so interested," simply extended to all courts the practice of the court of chancery, which in this respect "remains very much as it was a hundred years ago." The rule was not confined to persons who have or claim some *beneficial proprietory right* which they are asserting or defending. To justify a person suing in a representative capacity it is enough that he has a common interest with those whom he claims to represent. *Dicta* in Templeton v. Russell, [1893] 1 Q. B. 435, were overruled.

(a) This section is cited in Washington Co. v. Williams, 111 Fed. 801, 815, dissenting opinion of Sanborn, Cir. J.; Osborne v. Wisconsin Central R. Co., 43 Fed. 824, by Harlan, J.

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[1] Cadigan v. Brown, 120 Mass. 493, 495; Ballou v. Inhabitants of Hopkinton, 4 Gray, 324, 328; Murray v. Hay, 1 Barb. Ch. 59, 43 Am. Dec. 773; Reid v. Gifford, Hopk. Ch. 416, 419, 420; but see Marselis v. Morris Canal Co., 1 N. J. Eq. 31. In Cadigan v. Brown, 120 Mass. 493, 495, the plaintiffs were individual owners of separate lots abutting on a passage-way, each holding under a distinct title from a different grantor. Defendant began an erection which would permanently block up the passage and interfere with each plaintiff's right of way, and was therefore a nuisance. The plaintiffs brought this suit to restrain the further erection, and to remove the obstruction. Held, that the suit should be sustained, and that all the plaintiffs could join in one suit in equity on the ground of preventing a multiplicity of suits, since at law each owner must bring a separate action. "The plaintiffs, although they hold

(b) In the following cases separate riparian owners properly joined in a suit to restrain the diversion or pollution of the stream. Barham v. Hostetter, 67 Cal. 272, 7 Pac. 689; Churchill v. Lauer, 84 Cal. 233, 24 Pac. 107; Foreman v. Boyle, 88 Cal. 290, 26 Pac. 94; Middleton v. Flat R. B. Co., 27 Mich. 533; Emery v. Erskine, 66 Barb. 9; Lonsdale Co. v. Woonsocket, 21 R. I. 498, 44 Atl. 929, and cases cited; Strobel v. Kerr Salt Co., 164 N. Y. 303, 79 Am. St. Rep. 643, 58 N. E. 142, 51 L. R. A. 687. In the last case the court says: "They all have a common grievance against the defendant for an injury of the same kind, inflicted at the same time and by the same acts. The common injury, although differing in degree as to each owner, makes a common interest, and warrants a common remedy." See the well-considered case of State v. Sunapee Dam Co. (N. H.), 55 Atl. 899, where the court was evenly divided on the ques-

their right under separate titles, ***have a common interest in the subject of the bill.*** They are affected in the same way by the acts of the defendant, and seek the same remedy against him. The rights of all parties can be adjusted in one decree, and a multiplicity of suits is prevented"; citing Ballou v. Hopkinton, and Murray v. Hay. In Ballou v. Inhabitants of Hopkinton, 4 Gray, 324, 328, the plaintiffs were individual owners of separate mills on the banks of a stream, and each drew a supply of water for his own mill from a dam higher up on the stream, which had been built by all of these proprietors. The defendants had begun to draw water from this dam, not removing or in any way interfering with the structure itself, but simply diverting the water, so that the supply for each mill was lessened, and might be rendered insufficient. It was held that the plaintiffs could join in one equity suit, and restrain the defendants by injunction, in order to prevent a multiplicity of suits. In Murray v. Hay, 1 Barb. Ch. 59, 43 Am. Dec. 773, the plaintiffs were in like manner owners of separate dwellings, which were all injured by a single nuisance, of which the defendant was the author. It was

tion of jurisdiction to award damages in lieu of injunction. Owners of distinct lots abutting upon a street joined in suits to restrain common nuisances, in Geurkink v. Petaluma, 112 Cal. 306, 44 Pac. 570 (watercourse so diverted as to interfere with plaintiffs' easement in the street); Younkin v. Milwaukee Co., 112 Wis. 15, 87 N. W. 861 (railway unlawfully constructed in street; but see *contra*, Fogg v. Nevada C. V. R. Co., 20 Nev. 429, 23 Pac. 840); Sullivan v. Phillips, 110 Ind. 320, 11 N. E. 300 (drain so constructed as to flood plaintiff's lands). Other nuisances affecting plaintiffs similarly: flooding plaintiff's lands by deepening a certain ditch, Foot v. Bronson, 4 Lans. 47; establishing a cemetery, Jung v. Nerez, 71 Tex. 396, 9 S. W. 344; erecting a wooden building within the fire limits of a town, First Nat. Bank v. Sarlls, 129 Ind.

suffered the same kind of wrong to their separate properties, arising at the same time and from the same tortious act of the defendant, and in the fact that the legal causes of action and remedial rights of each and all were the same, depending upon similar matters of fact and the same rules of law. They were in exactly the same position as that of any body of men who have all separately and individually suffered the same kind of injury to their persons or their properties by one trespass or other wrongful act; only in their cases the subject-matter which directly received the injury — the parcels of land — and the wrong itself — the nuisance or continued trespass — were of such a nature as brought them within the *possible* jurisdiction of equity, since a court of equity could never take jurisdiction in a case of mere wrong to the persons or the reputation of the in-

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held that they could all unite and obtain full relief of injunction and removal by one decree; citing Kensington v. White, 3 Price, 164; Mills v. Campbell, 2 Younge & C. 389; Reid v. Gifford, Hopk. Ch. 416; Trustees of Watertown v. Cowen, 4 Paige, 510, 27 Am. Dec. 80. In Reid v. Gifford, Hopk. Ch. 416, the plaintiffs were in the same manner owners of separate parcels of land on a mill stream, and of separate water rights in such stream. Defendant owned another mill-site on the same stream. He had cut a ditch or canal, by which he diverted water from the stream, and thereby injured all the plaintiffs in the same manner, but in varying amounts. Plaintiffs united in this suit to obtain an injunction, and to abate the nuisance. Their suit was sustained. It was expressly held that they all had *such a community of interest in the subject-matter of the suit* that they could join in the bill. It was further held that since they had long been seised in fee of their respective premises, and in undisturbed possession thereof, no verdict or judgment at law was necessary to establish their rights, and as a prerequisite to their invoking the aid of equity.

201, 28 Am. St. Rep. 185, 28 N. E. 434, 13 L. R. A. 401 ("their common danger and common interest in the relief sought authorizes them to join in the action"); offensive manufacture, Blunt v. Hay, 4 Sandf. Ch. (N. Y.) 362; Whipple v. Guile, 22 R. I. 576, 48 Atl. 935 (nuisance from noise), reviewing many cases; maintaining lunatic asylum carelessly Rowbotham v. Jones, 47 N. J. Eq. 337, 20 Atl. 731, reviewing the New Jersey cases and concluding that "the meaning of the rule, so far as it permits several to join as complainants, is that all the grievances complained of shall affect all the complainants, not precisely at the same instant, and in the same degree, but in the same general period of time, and in a similar way, so that the same relief may be had in the single suit, whether there be one, two, or a dozen plaintiffs."

jured parties. And yet in each decision it was expressly held that there was a sufficient community of interest in the subject-matter of the suit to enable a court of equity to exercise its jurisdiction on behalf of the united plaintiffs. The conclusion, therefore, seems to me irresistible, that this group of decisions cannot be reconciled with that theory of the jurisdiction which requires, in cases of the third and fourth classes, a privity of interest or common legal relation existing among all the individuals of the body of persons who assert their separate claims against a single adversary party, in order that a court of equity may interfere on their united behalf against him, or on his behalf against them.[2] [c]

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[2] It may, perhaps, be said, in explanation of the judicial action in this group of cases, that on account of the continuous nature of the wrong — the nuisance or trespass — each separate owner, in addition to his actions at law for damages, would be entitled to maintain a separate suit in equity on his own behalf, and thereby restrain the further wrong. It would be enough to answer that in no instance was the decision put upon any such ground. In every instance the court rested its decree upon the broad ground that the legal remedies of the individual plaintiffs were imperfect, and that as there was a sufficient community of interest in the subject-matter among them, they could properly unite in the single equitable proceeding, in order to prevent a multiplicity of suits. But even admitting the facts above stated to their fullest extent, they do not in the slightest degree alter or affect the con-

(c) This seems an appropriate place to notice a criticism urged with much earnestness against the author's treatment of his "Third and Fourth Classes," viz., that he has confused "distinct things in his view of this subject, to wit: joinder of parties, and avoidance of multiplicity of suits. It has been found that many of the cases he pressed into service to support his assertion are on the subject of joinder, where confessedly there could be no doubt that the matter was of equity cognizance," etc. Tribette v. Illinois Central R. R. Co., 70 Miss. 182, 12 South. 32, 35 Am. St. Rep. 642, 19 L. R. A. 660, 1 Keener's Cas. Eq. Jur. 148, 2 Ames Cas. Eq. Jur. 74. It would seem that a very moderate degree of reflection should suffice to show that a statement of the accepted rules as to the joinder of parties is an essential and vital part of the author's arguments. It is conceded on all hands that the numerousness of parties is, under certain circumstances, viz., the existence of a "privity of interest" among them — an independent ground of equity jurisdiction. It has been established by cases innumerable that this "privity of interest" among numerous parties is not, as was once supposed, a requisite to their joinder in an ordinary suit in equity. Why, then, make it a requisite to the jurisdiction based on numerousness of parties, and thus apply to cases within that jurisdiction a rule as to parties wholly arbitrary and narrower

§ 258.[a] Distinct Proprietors Relieved from Local Assessments. — I pass now to consider another and even more interesting group of cases, which chiefly belong, with one or two excep-

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clusions reached in the text, nor furnish any different explanation of the action of the courts in exercising their jurisdiction. Even if each individual plaintiff would have had a right to equitable relief as well as to the legal relief of damages, the equitable jurisdiction to prevent a multiplicity of suits is never made to rest upon the *particular kind or extent* of relief which an individual party might otherwise have obtained in a separate suit. It always assumes that some relief, either legal or equitable, could have been thus obtained; and the only question, in cases of the third and fourth classes, is, whether there is a sufficient common bond among the body of similarly situated persons on the one side of the controversy to authorize the court to interfere and give *complete* relief to them or against them all in one proceeding, and thus avoid a multiplicity of suits.[d]

than the rule as to joinder of parties in other suits? It is not the relation of privity among the parties that gives rise to the jurisdiction of a court of equity, but their multitude, and the facilities of the procedure in that court for joining them and disposing of all the numerous legal issues in a single equitable issue. In any logical view of the subject, the measure of the jurisdiction to entertain a bill of peace should be as broad as the measure of the court's ability, in accordance with its settled rules, to join the numerous parties in a single suit. Such is the nature of the author's argument, as the editor understands it; and, clearly, a most important link in the chain is the statement and proof of the modern rules as to joinder of parties, based, as these rules are, not on the relationship of the parties among themselves, but on their community of interest in the questions involved in the suit. This identity between the rules as to joinder in all other equity actions, and the rules as to joinder which, as the author shows, guide the exercise of the jurisdiction in bills of peace, is clearly recognized in Lehigh Valley R. R. Co. v. McFarlan, 31 N. J. Eq. 730, 759, 1 Keener's Cas. Eq. Jur. 133. "The question [of joinder] has generally arisen on demurrer to bills in causes of purely equitable cognizance. But in this respect there is no difference between such bills and bills of peace. A bill of peace which shall draw within equitable cognizance causes of action which are purely legal in their character, must conform to the rules and principles of ordinary equity pleading, and, in addition thereto, must possess another element arising from the number of the parties interested and the multitude of actual or threatened suits. In such cases there must be such a unity of interest on the one side or the other, as would justify a joinder of the parties in causes of purely equitable cognizance. 17 N. Y. 608, Comstock, J." See also Williams v. County Court, 26 W. Va. 488, 516, 53 Am. Rep. 94.

(d) This sentence of the note is quoted by Parker, C. J., in Mack v. Latta, (N. Y.) 71 N. E. 97.

(a) This and the two following sections are cited with approval in Carlton v. Newman, 77 Me. 408, 415, 1 Atl. 194; Allen v. Intendant, etc., of La Fayette, 89 Ala. 641, 8 South. 30, 9 L. R. A. 497.

tions, to the judicial history of this country, and in which more than in any other has arisen the direct conflict of judicial opinion already mentioned. I refer to cases brought by or on behalf of a body of individual tax-payers or owners of distinct tracts of lands to be relieved from illegal assessments upon their separate properties, made by municipal corporations to defray the expense of local improvements; or from general taxes, either personal or made liens on property, unlawfully assessed and levied by counties, towns, or cities; or to set aside, annul, and be relieved from some unlawful public, official, and corporate act of a county, town or city,— by means of which a public debt would be created, and the burden of individual taxation would be ultimately increased. Those instances in which the jurisdiction has been exercised and the relief granted will alone be considered at present; those in which it has been denied to exist will be postponed to subsequent paragraphs, in which the general limitations upon the doctrine are examined. I shall take up first in order the cases of local assessments, and secondly, those of general taxes and of official acts creating public indebtedness and final taxation.

§ 259. **Relief from Illegal Taxes and Other Public Burdens in General.**— There are numerous decisions to be found in the reports of several states of equity suits brought by landowners to set aside illegal assessments or taxes laid upon their property, in which one court after another has repeated the formula that the suit would be sustained and the relief granted whenever it was necessary to remove a cloud from title, *or to prevent a multiplicity of suits.* In none of these cases is any attempt made to determine when the relief would be necessary or appropriate for the purpose of preventing a multiplicity of suits; and in most, if not all, of them the relief was refused and the suit dismissed expressly on the ground that it did not come within the equitable jurisdiction to prevent a multiplicity of suits. It is plain, therefore, that these decisions, notwithstanding the general formula which they all announce, do not *affirmatively* define the extent of the jurisdiction; but their authority, so far as it goes, is opposed to the exercise of the jurisdiction, under all ordinary circumstances, in the class of cases described.[1]

§ 260.[a] I pass to a line of cases much more definite and direct in their bearing upon the questions under discussion. Assessments for local improvements by municipal corporations are generally made a lien upon the lands declared to be benefited thereby; and where such is the case, the instances are numerous in which suits in equity brought by a number of individual owners of separate lots, or by one owner suing on behalf of himself and all the others similarly situated, to procure the enforcement and collection of the assessment to be enjoined, and the assessment itself to be set aside and annulled on account of its illegality, have been sustained upon the avowed ground that such relief granted in a single proceeding was both proper and necessary in order to prevent a multiplicity of suits. In all these cases each separate land-owner had, of course, some kind of legal remedy, either by action for damages against the officer enforcing the unlawful collection, or by writ of *certiorari* to review the assessment itself. But such remedy was inadequate when compared with the comprehensive and complete relief furnished by the single decree in equity.[1] [b] The jurisdiction has been carried much further. In a large number of the states the rule has been settled in well-considered and often-repeated adjudications by courts of the highest character for ability and learning, that a suit in equity will be sustained when brought by any number of tax-payers joined as co-plaintiffs, or by one tax-payer suing on behalf of himself and all others similarly situated, or sometimes even by a single tax-payer suing on his own account, to enjoin the enforcement and collection, and to set aside and annul, any and every kind of tax or assessment laid by county, town, or city authorities, either for general or special purposes, whether it be entirely personal in its nature and liability, or whether it be made a lien on the property of each tax-payer, whenever such tax is illegal; and in like manner to set aside and annul any and every illegal public official action or proceeding of county, town, or city authorities, whereby a debt against such county, town, or city would be unlawfully created, the public burden upon the community

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[1] Guest v. Brooklyn, 69 N. Y. 506, 512, 513; Heywood v. Buffalo, 14 N. Y. 534, 541; Mayor of Brooklyn v. Messerole, 26 Wend. 132, 140; Ewing v. St. Louis, 5 Wall. 413, 418, 419; Dows v. Chicago, 11 Wall. 108, 110, 111; Scribner v. Allen, 12 Minn. 148; Minnesota Oil Co. v. Palmer, 20 Minn. 468; White Sulphur Springs Co. v. Holley, 4 W. Va. 597; Bouton v. City of Brooklyn, 15 Barb. 375, 387, 392; Harkness v. Board of Public Works, 1 McAr. 121, 131–133. In each of these cases the general proposition was laid down as stated in the text, but in each the court refused to exercise jurisdiction and to give any equitable relief, on the ground that such a case does not come within the operation of the doctrine concerning a multiplicity of suits. In Guest v. Brooklyn, 69 N. Y. 506, 512, 513, it was further held that the assessment, being divided into a number of installments payable annually, did not bring the case within the doctrine, because each lot-owner had a sufficient remedy at law, and a decision on one installment would settle his liability as to all.

(a) This section is cited with approval in Dumars v. City of Denver (Colo. App.), 65 Pac. 580; Keese v. City of Denver, 10 Colo. 113, 15 Pac. 825.

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[1] Ireland v. City of Rochester, 51 Barb. 415, 435; Scofield v. City of Lansing, 17 Mich. 437; City of Lafayette v. Fowler, 34 Ind. 140; Kennedy v. City of Troy, 14 Hun, 308, 312; Clark v. Village of Dunkirk, 12 Hun, 181, 187. In Ireland v. City of Rochester, 51 Barb. 415, about ninety owners of distinct lots on a certain avenue united in the suit to restrain the collection of an illegal and void assessment, made in different amounts on their lots by the city authorities, in a proceeding to improve the avenue. The assessment was held void, and the suit was sustained on the express ground that a multitude of suits was thereby prevented. Henry R. Selden, Esq., who was counsel for the plaintiffs, said (p. 420): "If the collection had been proceeded with, more than eighty suits would have been necessary to accomplish what can better be done by this suit alone. Avoiding a multiplicity of suits is good ground for equity jurisdiction." The argument of counsel is not often cited as authority. But all who know Mr. Selden will agree with me that no member of the bar of the state of New York had a more extensive knowledge of or a greater familiarity with the principles of equity jurisprudence and jurisdiction than he; and his intellect had that peculiar integrity which would not permit him to maintain as counsel any legal position which he did not thoroughly believe as a lawyer. I esteem his opinion as a very strong evidence in support of the equitable jurisdiction in cases of this kind. Scofield v. City of Lansing, 17 Mich. 437, was a bill filed by a large number of owners of separate lots fronting on a street, to enjoin collection of an illegal assessment, which was declared by statute to be a lien on all the lands as-

(b) **Enjoining Municipal Assessments.**— The conclusions of the author with respect to classes third and fourth were approved, and the principle applied to the enjoining of illegal special assessments, in Keese v. City of Denver, 10 Colo. 113, 15 Pac. 825, and in Dumars v. City of Denver (Colo. App.), 65 Pac. 580. In the latter case it is said: "While void proceedings cast no cloud upon title to real estate, and a single individual, moving only in his own behalf, and for his own purposes, to restrain such proceedings, will be remitted to his remedy at law, yet where a number of persons are similarly affected, and the rights of all may be adjusted in one proceeding, a court of equity will assume jurisdiction, notwithstanding there is no cloud to remove, and the ground of its jurisdiction is the prevention of a multiplicity of suits. [Citing several cases, and Pom. Eq. Jur., §§ 260, 273.] The complaint in this case

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sessed. Pronouncing the assessment void, the court held that the suit could be sustained on the ground *that the questions to be decided were common to all the plaintiffs*, and it prevented a multiplicity of suits. City of Lafayette v. Fowler, 34 Ind. 140, in which the facts were similar, was decided in conformity with a general doctrine, which, as we shall see, is settled in that state with reference to all kinds of illegal taxes, assessments, and public burdens. In the recent cases of Kennedy v. City of Troy, 14 Hun, 308, 312, and Clark v. Village of Dunkirk, 12 Hun, 181, 187, upon facts similar to those in the Ireland case, the supreme court of New York held that a suit by one lot-owner suing on behalf of himself and all others in the same situation, to set aside an *illegal* assessment which was made a lien on their lands, would be sustained on the express ground that it came within the familiar jurisdiction of equity to grant relief for the purpose of preventing a multiplicity of suits. These decisions are the more emphatic because the courts of New York had previously held in many cases that the jurisdiction did not extend to suits brought by one or by many tax-payers to be relieved from ordinary, general, and personal taxes on the ground of their illegality. It is very evident that the proposition stated in the text and the decisions cited in this note would be followed, and the owners of lots would be relieved from illegal municipal local assessments in all those states where the courts have exercised a like jurisdiction to relieve tax-payers from all kinds of taxes and public burdens which are found to be illegal.

shows that a number of persons are affected by the same assessment, and that to determine their rights at law would require as many suits as there are individuals; and it also shows that, while they have no common ownership in the property affected by the assessment, they have a community of interest in the questions of law and fact involved in the controversy; and upon authority so overwhelming as to be practically unanimous, the case is one peculiarly of equitable cognizance. See also Pom. Eq. Jur., § 269." In Michael v. City of St. Louis, 112 Mo. 610, 20 S. W. 666, the text was approved, but it was held by the majority of the court that the complaint did not set out such facts that it could be seen from the face of the pleadings that the questions of law to be decided were the same as to all the plaintiffs.

would be unlawfully enhanced, and the amount of future taxation would be unlawfully increased; as, for example, unlawful proceedings of the municipal authorities to advance money or to loan the public credit to a railroad, or to bond the municipality in aid of a railroad, or to offer and pay bounties to soldiers, or to erect public buildings, and numerous other analogous proceedings which would necessarily result in a public debt and in taxation for its payment.[c] In the face of every sort of objection urged against a judicial interference with the governmental and executive function of taxation, these courts have uniformly held that the legal remedy of the individual tax-payer against an illegal tax, either by action for damages, or perhaps by *certiorari,* was wholly inadequate; and that to restrict him to such imperfect remedy would, in most instances, be a substantial denial of justice, which conclusion is, in my opinion, unquestionably true. The courts have therefore sustained these equitable suits, and have granted the relief, and have uniformly placed their decision upon the inherent jurisdiction of equity to interfere for the prevention of a multiplicity of suits. The result has demonstrated the fact that complete and final relief may be given to an entire community by means of one judicial decree, which would otherwise require an indefinite amount of separate litigation by individuals, even if it were attainable by any means.[2] [d] In several of the states there is a long series of these cases, extending through a considerable period of time, and it may

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[2] *Cases where the suit was by a number of tax-payers as co-plaintiffs, or by one suing on behalf of all others:* Attorney-General v. Heelis, 2 Sim. & St. 67, 76; Newmeyer v. Missouri, etc., R. R. Co., 52 Mo. 81, 84–89, 14 Am. Rep. 391; Rice v. Smith, 9 Iowa, 570, 576; Stokes v. Scott Co., 10 Iowa, 166; McMillan v. Boyles, 14 Iowa, 107; Rock v. Wallace, 14 Iowa, 593; Ten Eyck v. Keokuk, 15 Iowa, 486; Chamberlain v. Burlington, 19 Iowa, 395; Williams

(c) Quoted and approved in County Court v. Boreman, 34 W. Va. 362, 368, 12 S. E. 490; Williams v. County Court, 26 W. Va. 488, 53 Am. Rep. 94.

(d) **Enjoining Taxation; One or More Plaintiffs Suing on Behalf of All Taxpayers.**— The conclusions of the text are supported by the following cases: Greedup v. Franklin County, 30 Ark. 101; Bode v. New England Inv. Co., 6 Dak. 499, 42 N. W. 658; Knopf v. First Nat. Bk., 173 Ill. 331, 50 N. E. 660; City of Chicago v. Collins, 175 Ill. 445, 51 N. E. 907, 67 Am. St. Rep. 224, 49 L. R. A. 408;

v. Peinny, 25 Iowa, 436; Hanson v. Vernon, 27 Iowa, 28, 1 Am. Rep. 215; Zorger v. Township of Rapids, 36 Iowa, 175, 180; Board of Commissioners v. Brown, 28 Ind. 161; Lafayette v. Fowler, 34 Ind. 140; Noble v. Vincennes, 42 Ind. 125; Board of Commissioners v. Markle, 46 Ind. 96, 103–105; Galloway v. Chatham R. R. Co., 63 N. C. 147, 149, 150; Brodnax v. Groom, 64 N. C. 244, 246, 247; Worth v. Board of Commissioners, 1 Winst. Eq. 70; Vanover v. Davis, 27 Ga. 354, 358; Mott v. Pennsylvania R. R. Co., 30 Pa. St. 9, 62 Am. Dec. 664; Sharpless v. Philadelphia, 21 Pa. St. 148, 59 Am. Dec. 759; Moers v. Reading, 21 Pa. St. 188; Bull v. Read, 13 Gratt. 78, 86, 87; Mayor of Baltimore v. Gill, 31 Md. 375, 392–395; Barr v. Deniston, 19 N. H. 170, 180; Merrill v. Plainfield, 45 N. H. 126, 134; New London v. Brainard, 22 Conn. 552, 556, 557; Webster v. Town of Harwinton, 32 Conn. 131, 140; Terrett v. Town of Sharon, 34 Conn. 105; Scofield v. Eighth School District, 27 Conn. 499, 504; Colton v. Hanchett, 13 Ill. 615, 618; Robertson v. City of Rockford, 21 Ill. 451; Perkins v. Lewis, 24 Ill. 208; Butler v. Dunham, 27 Ill.

German Alliance Assur. Co. v. Van Cleave, 191 Ill. 410, 61 N. E. 94; Carlton v. Newman, 77 Me. 408, 1 Atl. 194; Clee v. Sanders, 74 Mich. 692, 42 N. W. 154; Ranney v. Bader, 67 Mo. 476; Sherman v. Benford, 10 R. I. 559; McTwiggan v. Hunter, 18 R. I. 776, 30 Atl. 962, 2 Ames Cas. Eq. Jur. 71; Quimby v. Wood, 19 R. I. 571, 35 Atl. 149; McClung v. Livesay, 7 W. Va. 329; Doonan v. Board of Education, 9 W. Va. 246; Corrothers v. Board of Education, 16 W. Va. 527; Williams v. County Court, 26 W. Va. 488, 53 Am. Rep. 94; Blue Jacket v. Scherr, 50 W. Va. 533, 40 S. E. 514. In Texas, while the general doctrine appears to be recognized, injunction will not lie after suits have already been begun for the collection of taxes; McMickle v. Hardin, 25 Tex. Civ. App. 222, 61 S. W. 322. In Arkansas the jurisdiction is now expressly conferred by the Constitution, 1874, art. 16, § 13: Little Rock v. Prather, 46 Ark. 471; Taylor v. Pine Bluff, 34 Ark. 603; Little Rock v. Barton, 33 Ark. 436; but was recognized previously; Greedup v. Franklin County, 30 Ark. 109. The necessity of the jurisdiction was stated with great force in the case last cited: "These plaintiffs have sued in behalf of themselves and of the other tax-payers of the county; this they may do in a court of equity. But suppose we send them back to a court of law, to assert their rights; we know that at the common law there can be no combination of parties; each tax-payer must sue in his own right to recover the tax erroneously assessed against him. What a multiplicity of suits at law must be brought, in order to get redress for one injury which it is proposed to stop in a single suit in equity; we have no means of ascertaining the number of tax-payers in Franklin county, but may suppose that they exceed two thousand. Of these perhaps five hundred may be able to assert their rights at law, whilst fifteen hundred, who pay less tax, are in moderate circumstances or too poor to employ counsel to stop the payment of an erroneous tax ten times less than it would cost to employ counsel to prosecute their suit. The mere suggestion of the situation, if left to redress at law, shows that it in effect would amount to well happen that in the earliest decisions of such a series the court has stated the reasons for its judgment at large, and

474; Drake v. Phillips, 40 Ill. 388, 393; Vieley v. Thompson, 44 Ill. 9, 13; Allison v. Louisville, etc., R. R. Co., 9 Bush, 247, 252; Lane v. Schomp, 20 N. J. Eq. 82, 89; Noesen v. Port Washington, 37 Wis. 168.

Cases where the suit was by only one tax-payer, purporting to sue for himself alone: Board of Commissioners v. Templeton, 51 Ind. 266; Board of Commissioners v. McClintock, 51 Ind. 325, 328; Board of Commissioners v. Markle, 46 Ind. 96, 103–105; Lafayette v. Cox, 5 Ind. 38; Nill v. Jenkinson, 15 Ind. 425; Coffman v. Keightley, 24 Ind. 509; Oliver v. Keightley, 24 Ind. 514; Nave v. King, 27 Ind. 356; Board of Commissioners v. McCarty, 27 Ind. 475; Harney v. Indianapolis, etc., R. R. Co., 32 Ind. 244, 247, 248; English v. Smock, 34 Ind. 115, 7 Am. Rep. 215; Williams v. Peinny, 25 Iowa, 436; Hanson v. Vernon, 27 Iowa, 28, 1 Am. Rep. 215; Zorger v. Township of Rapids, 36 Iowa, 175, 180; Merrill v. Plainfield, 45 N. H. 126, 134; Webster v. Town of Harwinton, 32 Conn. 131, 140; Terrett v. Town of Sharon, 34

a denial of redress to offer it to them. In such cases chancery will interfere to prevent multiplicity of suits." Ranney v. Bader, 67 Mo. 476, 480, by Norton, J.; "Equity will maintain jurisdiction to prevent multiplicity of suits, and no stronger case could be put for entertaining jurisdiction under this rule, than is presented, when one taxpayer for himself and all other taxpayers of a township or county, similarly interested, brings his bill, asking the chancellor to put forth restraining process to prevent the imposition and collection of an authorized tax, and thus settle in one suit, what it would take hundreds and, perhaps, thousands to do, if such relief were denied, and the parties subjected to the payment of such tax were driven, each one, to his action at law for redress." In Carlton v. Newman, 77 Me. 408, 1 Atl. 194, the conclusions of the author with respect to the third and fourth classes are approved and supported by quotations from many of the author's cases, and from Woodruff v. North Bloomfield G. M. Co., 8 Sawy. 628, 16 Fed. 25, and Cummings v. Nat. Bank, 101 U. S. 157. The court says, by Virgin, J.: "Moreover, it is generally held that a bill to restrain the collection of a tax cannot be maintained on the sole ground of its illegality. . . . There must be some allegation presenting a case of equity jurisdiction. . . . But we are of the opinion that when it appears that an entire school district tax is illegal because assessed without authority of law, a bill to enjoin its collection brought by all of the taxpayers of the district jointly on whose polls and estates the tax has been assessed, or by any number thereof on behalf of themselves and all the others similarly situated, may be sustained upon the ground of the inherent jurisdiction of equity to interpose for the purpose of preventing a multiplicity of suits; that although each taxpayer has some legal remedy, it is grossly inadequate when compared with the comprehensive and complete relief afforded by a single decree." Knopf v. First Nat. Bank, 173 Ill. 331, 50 N. E. 660, by Cartwright, J.: "In a case where a proposed tax is illegal, complete relief may be given to thousands of taxpayers by one decree, which would otherwise require an indefinite number of suits has expressly announced the principle of preventing a multiplicity of suits as the ground of its jurisdiction, while in

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Conn. 105; Prettyman v. Supervisors, 19 Ill. 406, 71 Am. Dec. 230; Clarke v. Supervisors, 27 Ill. 305, 311; Taylor v. Thompson, 42 Ill. 9; Cleghorn v. Postlewaite, 43 Ill. 428, 431; Vieley v. Thompson, 44 Ill. 9, 13; Allison v. Louisville, etc., R. R. Co., 9 Bush, 247, 252.

It should be observed that all of this latter group of cases arose in states where the courts had already decided that a suit by many tax-payers joined as plaintiffs, or by one suing on behalf of the others, would be sustained on the ground of preventing a multiplicity of suits, and they regarded a suit by one tax-payer alone as substantially the same in its effect, and treated it in the same manner, citing the same precedents indiscriminately in support of one or the other form. Indeed, in many of these latter cases, the court expressly said that the suit might be brought in either form, by many tax-payers joining as plaintiffs, by one suing on behalf of the others, or by one suing alone. No distinction in principle was made between the three.[e]

by different tax-payers who all have the same remedial right, and where the threatened tax would be an injury to all alike. It is the only method of doing substantial justice by relieving the whole body of tax-payers, where each of them must otherwise maintain an action at the same time and on the same ground"; reviewing the Illinois cases. In Williams v. County Court, 26 W. Va. 488, 53 Am. Rep. 94, the whole subject was most exhaustively discussed, the author's cases re-examined, and his conclusions adopted, save in a minor point which is noticed below, note (e).

For tax cases of the author's *fourth* class, see *post*, § 261, note b, Class Fourth, (I), (b); of the *second* class, see *ante*, § 253, notes 2 and (b).

Relief against Acts of Municipal Corporations whereby Public Burdens are Unlawfully Increased.— The author's treatment of this subject is mentioned with approval in Allen v. Intendant, etc., of La Fayette, 89 Ala. 641, 8 South. 30, 9 L. R. A. 497; Macon, etc., R. R. Co. v. Gibson, 85 Ga. 1, 11 S. E. 442, 21 Am. St. Rep. 135; County Court v. Boreman, 34 W. Va. 362, 368, 12 S. E. 490, and in Dillon on Municipal Corporations (4th ed.), § 922, note. The jurisdiction of equity to interfere in such cases on behalf of the taxpayer is hardly questioned at the present day. See Pom. Eq. Rem. Comparatively few of the innumerable recent cases which illustrate this jurisdiction have inquired into its grounds; but the *rationale* of the doctrine advanced by Judge Dillon has frequently received the sanction of the courts, viz., that the relation of the inhabitants of a municipality to its governing body, for the purposes of equitable jurisdiction, is analogous to that of the stockholders of a private corporation to its board of directors. It is plain, however, that this analogy is not a perfect one.

Injunction against the enforcement of an invalid municipal ordinance affecting many persons. See *post*, § 261, note b, Class Third, (I), (b).

(e) Quoted, Williams v. County Court, 26 W. Va. 488, 501, 53 Am. Rep. 94. In West Virginia the suit must be expressly in behalf of all the tax-payers: Id.; McClung v. Livesay, 7 W. Va. 329; Doonan v. Board the succeeding ones the judges have not thought it necessary to repeat the reasons and ground which had already been fully explained.[f] It is plain that the latter cases, no less

The case of Attorney-General v. Heelis, 2 Sim. & St. 67, 76, is important, since it shows that the doctrine was applied in exactly the same manner, under exactly analogous circumstances, by an English court of equity. A rate had been laid on a parish which was claimed to be illegal. The court held that as the inhabitants of the parish have a common interest to avoid the rate (i. e., a local tax), any one or more of them may sue on behalf of himself and the other inhabitants to enjoin the enforcement of the rate. Newmeyer v. Missouri, etc., R. R. Co., 52 Mo. 81, 84–89, is an instructive case. Being recent, the court had before it a large number of decisions, all the leading ones in which the jurisdiction had been denied, as well as those in which it had been sustained. Its examination of these authorities was very full. The plaintiffs sued for themselves and all other tax-payers in the county of Macon, as owners of separate property, real and personal, to set aside a resolution or order of the county officials subscribing one hundred and seventy-five thousand dollars to the stock of the railroad, and to have the bonds issued by the county for the said amount canceled, on the ground that the whole proceeding was illegal, and would unlawfully increase taxation. The suit was sustained and the relief granted. In Lane v. Schomp, 20 N. J. Eq. 82, 89, which was also a suit on behalf of the tax-payers of a town to prevent an unlawful bonding of the town, the chancellor of New Jersey expressly held that the case was not controlled by the principle asserted in some decisions, and particularly described hereafter, that where an individual has suffered some injury from a public act, in common with all members of the same community or local district, he has no cause of action or remedial right enforceable in any court of justice.

of Education, 9 W. Va. 246; Blue Jacket, etc., Co. v. Scherr, 50 W. Va. 533, 40 S. E. 514. Compare Knopf v. First Nat. Bank, 173 Ill. 331, 50 N. E 660: "The right of each one is individual and separate, but the common relation has been deemed sufficient to authorize the exercise of the power of equity either where the suit is by a number of tax-payers on behalf of themselves and others similarly situated, or by one suing on behalf of all others, or even where the suit is by one suing for himself alone, where the effect would be to settle the rights of all. In this case the suit is to maintain the rights of the stockholders [of the plaintiff], but the necessary effect is to determine the right of every tax-payer in the district, and it would be an irrelevant distinction that the bill does not, in set phrase, purport to be on behalf of all others having individual and separate interests of the same character."

It has not seemed necessary to add to the author's citation of cases from those states—Illinois, Indiana, Iowa, etc.—which permit the injunction of illegal taxation at the suit of the single plaintiff on the mere ground of its illegality. For a further discussion of equitable relief against taxation, and a statement of the varying rules established in the different states, see Pom. Eq. Rem.

(f) Quoted, Williams v. County Court, 26 W. Va. 488, 502, 53 Am. Rep. 94.

than the former ones, are an authority for the doctrine under examination. In all these suits by lot-owners to be relieved from a local assessment, and by tax-payers to be relieved from a tax or burden of public debt, there is no pretense of any privity, or existing legal relation, or common property or other right, among the plaintiffs individually, or between them as a body and the defendant. There is no common right of the single adversary party against them all, as is found in the case of a parson against his parishioners for tithes, or of the lord of a manor against his tenants for a general fine, or for certain rights of common; nor is there any common *right* or interest among them against their single adversary. The only community among them is in the questions at issue to be decided by the court; in the mere external fact that all their remedial rights arose at the same time, from the same wrongful act, are of the same kind, involve similar questions of fact, and depend upon the same questions of law.[g] This sort of community is sufficient, in the opinion of so many and so able courts, to authorize and require the exercise, under such circumstances, of the equitable jurisdiction, in order to prevent a multiplicity of suits.

§ 261. **Other Special Cases of the Third and Fourth Classes.**[a] — There are some other cases, belonging to the third or fourth of my general classes, which present a special condition of facts, and do not admit of being arranged in either of the foregoing groups. I have placed them in the footnote.[1] [b]

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[1] Brinkerhoff v. Brown, 6 Johns. Ch. 139, 151, 156; New York & N. H. R. R. v. Schuyler, 17 N. Y. 592, 599, 600, 605–608, 34 N. Y. 30, 44–46; but see County of Lapeer v. Hart, Harr. (Mich.) 157. In Brinkerhoff v. Brown, 6

[g] Quoted with approval, Michael v. City of St. Louis, 112 Mo. 610, 20 S. W. 666.

[a] This section is cited in Enright v. Grant, 5 Utah, 334, 15 Pac. 268, a case of the "third class."

[b] In arranging the very numerous recent cases illustrating classes third and fourth, the editor has collected, in each class, *first*, cases where the prevention of a multiplicity of suits was the sole ground of equitable jurisdiction, or was relied on by the court as an independent ground of jurisdiction; *second*, cases where other grounds of jurisdiction

§ 262. Opposing Decisions Examined.— Thus far the discussion has been chiefly confined to the various instances in

Johns. Ch. 139, which was a bill by a number of individual judgment creditors, having wholly distinct and separate judgments and demands, to reach the property of their common debtor, Chancellor Kent said (p. 151): "The plaintiffs are judgment creditors at law, seeking the aid of this court to render their judgments and executions effectual against certain fraudulent acts of their debtor equally affecting all of them. The question is, whether judgment creditors, whose rights are established and their liens fixed at law, may not unite in a bill to remove impediments to the remedy created by the fraud of the opposite party. It is an ordinary case in this court for creditors to unite, or for one or more on behalf of themselves and the rest, to sue the representative of the debtor in possession of the assets, and to seek an account of the estate. *This is done to prevent a multiplicity of suits*, a very favorite object with this court." And at page 156: "A bill may be filed *against* several persons relative to matters of the same nature, forming a connected series of acts, and all intended to defraud and injure the plaintiff, and in which all the defendants were more or less concerned, though not jointly, in each act." This opinion of Chancellor Kent shows that the uniting of numerous distinct judgment creditors in one creditor's suit against the same defendant, or the suing by one such creditor for himself and all others, which has now become so familiar a mode of obtaining relief, was originally permitted and adopted on the ground of preventing a multiplicity of suits. This fact is of great importance in illustrating the meaning and extent of that doctrine; since the only bond of union among the separate creditors is their community of interest in the relief demanded, in the questions at issue and decided by the court.[c] New York & N. H. R. R. Co.

appear to exist, and the question is chiefly one of joinder of parties. Cases in the first groups, of course, afford stronger proof of the existence of the jurisdiction than those in the second. In some instances, however, it is difficult to determine to which group the case is properly assignable, for the obvious reason, that if the doctrine is accepted as a ground of jurisdiction, it is immaterial to the court, in its decision of the case, whether the separate causes of action consolidated therein are legal or equitable in their nature; see *ante*, notes at end of § 257.

Third Class. (I), Cases where the Multiplicity of Suits Conferred Jurisdiction or Warranted Its Exercise.— (a) Actions at Law against Numerous Parties, where each had the same defense, enjoined: Defendant, a railroad, claiming certain land under a land grant act, brought or threatened to bring separate actions of ejectment against the plaintiffs, who were in possession of separate tracts and claimed to be owners thereof under the homestead and pre-emption laws. By Harlan, J.: "They have thus a community of interest in the questions of law and fact upon which the issue between the railroad company and each plaintiff depends. The company's claim is good or bad against all the plaintiffs, as it may be good or bad against any one of them; and yet a judgment in favor of one, in an

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(c) The author's note is cited in the similar case of Enright v. Grant, 5 Utah, 340, 15 Pac. 270.

which the jurisdiction has been established, upheld, and confirmed; I now proceed to consider the opposite side of the

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v. Schuyler, 17 N. Y. 592, was certainly one of the most remarkable actions recorded in the annals of litigation. Schuyler, the treasurer of a railroad company, had during a period of two or three years fraudulently issued spurious certificates of stock of the company, until at last such certificates were scattered among about one hundred *bona fide* holders. Each fraudulent issue was accomplished by a similar contrivance and similar acts of deception; but each was, of course, an entirely distinct and separate transaction from all the others. The railroad, claiming that these certificates were null and void, brought this suit against all the holders for the purpose of having them surrendered up and canceled. The suit was sustained by analogy to a bill of peace, in an elaborate opinion of the court which is too long for quotation. See 17 N. Y. 592, 599, 600, 605–608, 34 N. Y. 30, 44–46. Here the only pretense of common interest among the certificate-holders was in the similar questions of fact and the same question of law at issue upon which all their claims depended; there was no common title from which these questions sprung, nor any community of interest in the subject-matter. See also the recent and strongly analogous case of Sheffield Water Works v. Yeomans, L. R. 2 Ch. 8, 11; *ante*, note to § 256; and Black v. Shreeve, 7 N. J. Eq. 440, 456, 457; *ante*, note to § 252; and Board of Supervisors v. Deyoe, 77 N. Y. 219, 225.

action of ejectment brought by the company, would not avail the others in separate actions of ejectment against them. The case is peculiarly one in which the jurisdiction of a court of equity may be invoked in order to avoid a multiplicity of suits [citing Pom. Eq. Jur., §§ 245, 255, 257, 268, 269, 273]. The fact that the several tracts of land here in dispute were entered at different dates, and by different persons, is of no consequence, as the validity of each entry, as against the railroad company, depends upon precisely the same questions of law and fact;" Osborne v. Wisconsin Central R. Co., 43 Fed. 824, 826, 827. See also the similar case of Lovett v. Prentice, 44 Fed. 459, quoting this chapter. Suits by one insured against numerous insurance companies were enjoined, where each had the defense that its policy was obtained by the same fraudulent misrepresentations of the insured: Virginia-Carolina Chemical Co. v. Home Ins. Co., 113 Fed. 1 (C. C. A.), citing this chapter, S. C., 109 Fed. 681; see also American Cent. Ins. Co. v. Landau, 56 N. J. Eq. 513, 39 Atl. 400, by Pitney, V. C., quoting or citing this chapter and reviewing many cases; Rochester German Ins. Co. v. Schmidt, 126 Fed. 998; Tisdale v. Insurance Co. of North America (Miss.), 36 South. 568.

(b) Injunction against the enforcement of an invalid municipal ordinance affecting many persons. In City of Chicago v. Collins, 175 Ill. 445, 51 N. E. 904, 2 Ames Cas. Eq. Jur. 92, numerous residents and taxpayers sued in behalf of themselves and all others similarly situated to enjoin the enforcement of an ordinance providing for the payment of a license fee on vehicles. The court, quoting § 245 of the text, and upholding the injunction, says in part: "In this case three hundred and seventy-three complainants present facts showing that question, and to examine those groups of cases in which the jurisdiction has either been positively denied under the same

between 200,000 and 300,000 citizens and tax-payers are affected by the provisions of the ordinance, and if compelled to pay the illegal tax, hardship and injustice will result to an enormous number of persons. If they pay the tax and are compelled to resort to a court of law to recover back the amount so paid, the business of the courts will be obstructed by the number of actions of the same character. Long delay will ensue, and the costs to the persons so paying such illegal tax or license fee will be greater than the amount to be recovered." See also the similar cases of Wilkie v. City of Chicago, 188 Ill. 444, 80 Am. St. Rep. 182, 58 N. E. 1004.

(c) **Injunction Against Trespass, or other Wrongful Act of the Defendant, Affecting Numerous Plaintiffs,** where each suing singly might have an "adequate" remedy at law: Suit by a number of importers of tea which was about to be destroyed by the collector of customs under color of a statute alleged by the plaintiffs to be unconstitutional. Though damages would be an adequate compensation to each plaintiff for any loss which he would sustain by reason of the destruction of the tea, and though each has a separate and distinct interest in the tea, they have "a common interest in the question whether the defendant is authorized by law to destroy such tea;" Sang Lung v. Jackson, 85 Fed. 502. Numerous owners of fishing interests in a lake united in a suit to enjoin an unauthorized and illegal act of certain commissioners, in opening a channel between the lake and the ocean. It did not appear that the threatened act would cause any of the plaintiffs such damage as to justify an injunction at his single suit. "The principal, if not the only, ground upon which the court can properly take jurisdiction in this case is that there are many parties plaintiff, all of whom, as land-owners on Great Pond, have the same rights, which can be settled in one action in equity, so as to avoid a multiplicity of suits at law. Upon that ground it seems to be our duty to determine the rights of the parties in this form of proceeding." Smith v. Smith, 148 Mass. 1, 18 N. E. 595, 2 Ames Cas. Eq. Jur. 64.

(d) **Injunction against Breach of Contract affecting numerous parties.** A contract by a city with a gas company, authorizing the use of the city's streets, fixed maximum rates to be charged its inhabitants. Jurisdiction of a suit to enjoin enforcement of excessive rates was rested chiefly on the ground of the avoidance of a multiplicity of suits by the inhabitants against the gas company, and the city was held a proper party to sue as representative of its inhabitants. Muncie Natural Gas Co. v. City of Muncie, 160 Ind. 97, 66 N. E. 436, 441, citing this chapter.

(e) **Cancellation in Favor of Numerous Plaintiffs.**—Promissory notes were obtained from fifty-seven persons by the defendant's same fraudulent misrepresentation. A suit by these persons to cancel their several notes was sustained, jurisdiction being rested on the grounds maintained by the author. Hightower v. Mobile, J. & K. C. R. R. Co. (Miss.), 36 South. 82. The situation here is the converse of that stated *post*, in this note, class fourth (e).

(f) **Pecuniary Relief to Numerous Plaintiffs.**—In Smith v. Bank of New England, 69 N. H. 254, 45 Atl. 1082, circumstances in which it had been asserted and exercised by the authorities previously quoted, or has been carefully

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2 Ames Cas. Eq. Jur. 79, the holders of numerous certificates of deposit were permitted to join in an action charging the defendants with a negligent breach of trust affecting them all alike, although each plaintiff might maintain his action at law for damages; since the "question of the defendants' negligence would be exactly the same in all the actions and would necessarily be determined upon the same evidence." See extract from the opinion of the court, *post*, § 267, note. See also the somewhat similar case of Boyd v. Schneider, (C. C. A.), 131 Fed. 223, reversing 124 Fed. 239, and relying on the author's text, § 245 (suit by numerous depositors in bank against negligent directors). In Washington County v. Williams, 111 Fed. 801, 49 C. C. A. 621, numerous separate owners of a certain issue of county bonds joined in a suit to have their validity established and a part payment of the sums due on each made from the fund in the county treasury. It was held in the dissenting opinion of Sanborn, Cir. J., that since the "only point of litigation is a common one," viz., whether or not the issue of the bonds was authorized by the statutes of Nebraska, and since "the complainants' rights and causes of action arise from a common source — from the act of the county in issuing the bonds, . . . involve similar facts . . . are governed by the same legal rules . . . the case falls far within the familiar rule which has been quoted from Pomeroy;" citing the text, §§ 245, 255, 257, 268, 269, 273. For the decision of the majority of the court, distinguishing the case from the operation of the principle, see *post*, § 267, note.

The principle of the "third class" has sometimes been invoked in support of a suit by numerous plaintiffs claiming to share ratably in a fund of limited amount; Pennefeather v. Baltimore Steam Packet Co., 58 Fed. 481, quoting § 245 of the text. But there seems to be here some misconception as to the particular doctrine discussed by the author. It is true that in cases like the one last mentioned the jurisdiction depends in part upon the existence of several plaintiffs, but its exercise does not depend on the existence in favor of each plaintiff of the same question of fact or of law. Each plaintiff's right may be, not merely distinct, but different, and require a separate issue for its establishment. Indeed, the cases in question present little, if any, analogy with bills of peace. The jurisdiction is exercised because of the difficulty or impossibility of effecting an apportionment of the fund in separate suits at law. See Snowden v. General Dispensary, 60 Md. 85. Familiar illustrations are found in suits by creditors of a corporation to enforce the liability of the directors or stockholders for its debts, where that liability is limited in amount, and is treated as a fund for the benefit of all the creditors. Bauer v. Platt, 72 Hun, 326, 25 N. Y. Supp. 426; Pfohl v. Simpson, 74 N. Y. 137; Barton Nat. Bank v. Atkins, 72 Vt. 33, 47 Atl. 176.

II. Joinder, where Each of the Numerous Plaintiffs has an Equitable Cause of Action.— In addition to the class of cases described above, § 257, see the following analogous cases: In the states where the illegality of a tax clouding the plaintiff's title is a ground for enjoining its collection at explained, restricted, and limited within strict and narrow bounds. I shall follow the same order as before, arranging

the suit of a single plaintiff, owners of separate tracts who are alike affected by the illegality may unite as plaintiffs: Robbins v. Sand Creek T. Co., 34 Ind. 461; Brandriff v. Harrison Co., 50 Iowa, 164; Thomas v. Moore, 120 Mich. 535, 79 N. W. 812; Bull v. Read, 13 Gratt. 79. Numerous foreign insurance companies affected by the act of the insurance commissioner in threatening to revoke their licenses to do business may join in an action for an injunction, on account of their common interest in the question involved; Liverpool & L. & G. Ins. Co. v. Clunie, 88 Fed. 160, 167, citing this chapter. Several persons who by the same fraudulent misrepresentations are induced to subscribe for stock in a corporation may join in an action to set aside their subscriptions and recover moneys paid thereon; Bosher v. Richmond H. Land Co., 89 Va. 455, 37 Am. St. Rep. 879, 16 S. E. 360, citing § 269 of the text; Carey v. Coffee-Stemming Mach. Co. (Va.), 20 S. E. 778, citing § 269 of the text; so, two plaintiffs who were induced by the same fraud to sell their stock may join in a bill to rescind the sale; Bradley v. Bradley, 165 N. Y. 183, 58 N. E. 887; citing this chapter and many cases. Joinder of plaintiffs deriving title from a common source in a suit to quiet title; Prentice v. Duluth Storage Co., 58 Fed. 437; or to remove a cloud on their title; Dart v. Orme, 41 Ga. 376. Joinder in a creditor's bill of plaintiffs who have recovered separate judgments against their common debtor; Sheldon v. Packet Co., 8 Fed. 769 (Harlan, J.); Enright v. Grant, 5 Utah, 334, 15 Pac. 268, citing note to this section. Bill by all the creditors of an insolvent, or some in behalf of the rest, to enforce a trust; Libby v. Norris, 142 Mass. 246, 7 N. E. 919. Bill by one bondholder in behalf of others to enforce a trust under a reorganization agreement; Indiana, I. & I. R. Co. v. Swannell, 157 Ill. 616, 41 N. E. 989, 30 L. R. A. 290, 297, citing § 269 of the text. Stockholders in a corporation were allowed to join in an action for equitable relief, where the majority were pursuing an illegal course, although their interests in the subject-matter of the litigation were separate, and not joint; Barr v. N. Y., etc., R. R. Co., 96 N. Y. 444. One or more stockholders of a mutual insurance company may on behalf of all bring a suit to set aside the appointment of an assignee, and to cancel assessments, and for other relief. Corey v. Sherman, 96 Iowa, 114, 64 N. W. 828, 32 L. R. A. 490, 509, quoting § 269 of the text.

Class Fourth. (I) Cases where the Avoidance of a Multiplicity of Suits Conferred Jurisdiction or Warranted Its Exercise.— (a) Injunction against Numerous Defendants Prosecuting Suits at Law.— Sundry owners of property abutting on a street occupied by the tracks of the complainant railroad brought suits at law for damages resulting to them from the construction and operation of the railroad, claiming that it was a mere trespasser in the street. The complainant, asserting a charter from the state to occupy the street, brought an action in the nature of a bill of peace to enjoin these suits and determine its rights; the bill was upheld on the ground of avoiding a multiplicity of suits; Guess v. Stone Mountain I. & R. Co., 67 Ga. 215, and the similar case of all the cases in the four classes described in a preceding paragraph.

South Carolina R. Co. v. Steimer, 44 Ga. 546. Illinois Central R. Co. v. Garrison, 81 Miss. 257, 32 South. 996, 95 Am. St. Rep. 469, appears to be a case of the same general character, so far as may be judged from the imperfect statement of facts. Complainant claimed the right to overflow, by means of its dam, the lands of the numerous defendants, under a dedication by the defendants' predecessors in title; held, that it might properly bring its bill to establish this right and enjoin actions at law for damages brought by the defendants, citing the text, § 268; Mayor of York v. Pilkington, 1 Atk. 282, and other cases. The court also indicated that it was the proper practice in such cases to issue a temporary writ enjoining each of the defendants from further prosecution of his action at law during the pendency of the equitable action. "No constitutional rights of defendants are taken away by the mere postponement of their actions at law; for if plaintiff is herein successful they are not entitled to an assessment of damages, and if unsuccessful the actions at law will duly proceed;" City of Albert Lea v. Nielsen, 83 Minn. 246, 86 N. W. 83; same litigation, City of Albert Lea v. Davies, 80 Minn. 101, 81 Am. St. Rep. 242, 82 N. W. 1104, and State v. District Judge, 85 Minn. 215, 88 N. W. 742. The receiver of a national bank brought an action in the nature of a bill of peace against numerous holders of pass-books issued by a savings bank in the name of the national bank. Several of the defendants had brought suits against the plaintiff, each presenting the common question of the authority of the savings bank to bind the national bank. It was held that the bill of peace was properly brought, though the defendants' claims each arose from an entirely separate and distinct transaction; citing the text, §§ 255, 269, 274, and reviewing the New York cases; Kellogg v. Chenango Valley Sav. Bank, 42 N. Y. Supp. 379, 11 App. Div. 458. See also Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, an action brought by railroad companies to test the validity of a statute regulating rates, where "the transactions of a single week would expose any company questioning the validity of the statute to a vast number of suits by shippers, to say nothing of the heavy penalties named in the statute;" Dinsmore v. Southern Express Co., 92 Fed. 714, a similar case, and Haverhill Gaslight Co. v. Barker, 109 Fed. 694, injunction against state officers fixing rates for gas, where the action of the officers would involve the plaintiff in a multitude of suits with its customers; Jordon v. Western U. T. Co. (Kan.), 76 Pac. 396. In National Park Bank v. Goddard, 62 Hun, 31, 16 N. Y. Supp. 343, 2 Ames Cas. Eq. Jur. 82; affirmed, 131 N. Y. 503, 30 N. E. 566, 1 Keener Cas. Eq. Jur. 142, the plaintiff, claiming a lien by attachment on a stock of goods, enjoined numerous replevin suits subsequently brought for the recovery of different portions of the stock by numerous defendants, jurisdiction being taken on the ground of preventing a multiplicity of suits.

(b) Injunction against Tax Proceedings which involve the single plaintiff in litigation with numerous parties. The situation in these cases is the converse of that described in §§ 258–260, *supra*. Where a bank or other

§ 263. In the First and Second Classes.— As the doctrine of preventing a multiplicity of suits has been firmly estab-

corporation is required by law to pay the taxes assessed on all of its shares, and reimburse itself by withholding proportionate parts of the dividends from its shareholders, it may enjoin an illegal tax, since its payment thereof would subject it to a suit by each shareholder; Cummings v. Merchants' Nat. Bank, 101 U. S. 153; followed in Hills v. National Albany Exch. Bank, 105 U. S. 319, 5 Fed. 248; Albany City Nat. Bank v. Maher, 19 Blatchf. 184, 6 Fed. 417; Whitney Nat. Bank v. Parker, 41 Fed. 402; Third Nat. Bank v. Mylin, 76 Fed. 385. By the practice in many of the states, taxes on railroad companies, telegraph companies, and the like are assessed by a state board on all the property of the company within the state, and proportionate parts of these taxes are certified for collection to the tax officials of the various counties in which the company operates. An illegality in the assessment by the state board may thus expose the company to separate suits in many counties, and has frequently been the subject of an injunction on the ground of preventing a multiplicity of suits: Western Union Tel. Co. v. Poe, 61 Fed. 449, 453, by Taft, Cir. J.; Sanford v. Poe, 69 Fed. 546, 548, 16 C. C. A. 305, 60 L. R. A. 641; Western Union Tel. Co. v. Norman, 77 Fed. 13, 21; Taylor v. Louisville & N. R. R. Co., 88 Fed. 350, (C. C. A.), by Taft, Cir. J.; Chesapeake & O. R. R. Co. v. Miller, 19 W. Va. 408. See also the following cases, in which railroad companies were exposed to tax suits in different counties, all involving a common question: Union Pac. R. R. Co. v. McShane, 3 Dill. 303, Fed. Cas. No. 14,382; affirmed, 22 Wall. 444; Union Pac. R. R. Co. v. Cheyenne, 113 U. S. 516, 5 Sup. Ct. 601; Northern Pac. R. R. Co. v. Walker, 47 Fed. 681 (quoting § 274 of the text); Mobile & O. R. R. Co. v. Moseley, 52 Miss. 127, 137. In Pyle v. Brenneman, 122 Fed. 787, the plaintiff, in pursuit of his legal remedy, would have been compelled to sue a number of different municipalities among whom the tax collected would be distributed.

(c) Injunction against Numerous Attachments or Executions on property claimed adversely by complainant. "Where several executions in favor of different plaintiffs have been levied on the same property, and one person has filed in resistance to each levy a separate claim, and the claim cases thus made are pending in court, all involving the same question, and it being one upon the decision of which the subjection or non-subjection of the property to all the executions depends, an equitable petition will lie in favor of the claimant against all the plaintiffs, jointly, to bring to trial all of the claims together, and dispose of them by one verdict and judgment;" Smith v. Dobbins, 87 Ga. 303, 13 S. E. 496, relying on § 269 of the text. Similarly, where a debtor has made a transfer of his property, and thereafter successive attachments are levied and threatened thereon by his creditors, each claiming that the transfer was fraudulent, the transferee may maintain an action against all of the attaching creditors to have further attachments enjoined and his right to the property determined; Bishop v. Rosenbaum, 58 Miss. 84 (though the statute provides a method for third persons to assert their claims lished from an early day, with respect to the facts and circumstances which constitute the first and second classes,

to property attached); Pollock v. Okolona Sav. Inst., 61 Miss. 293 (relying on this chapter); Lowenstein v. Abramsohn, 76 Miss. 890, 25 South. 498. See also the analogous case of National Park Bank v. Goddard, 62 Hun, 31, 16 N. Y. Supp. 343, 2 Ames Cas. Eq. Jur. 82; affirmed in 131 N. Y. 503, 30 N. E. 566, 1 Keener's Cas. Eq. Jur. 142; and Chase v. Cannon, 47 Fed. 674, which was a suit by a receiver to determine what liens by garnishment certain creditors had upon property he was suing to recover, there being a question of law common to the claim of each defendant.

(d) **Injunction against Numerous Trespassers** where the relief might not be granted against a single defendant. In Stockwell v. Fitzgerald, 70 Vt. 468, 41 Atl. 504, it was held that equity has jurisdiction of a bill to maintain a right of way against the encroachments of several owners who have distinct interests to avoid a multiplicity of suits. "Proceedings at law might result in his having no passage-way, although given a strip two rods wide as against each lot." In Woodruff v. North Bloomfield, etc., Min. Co., 8 Saw. 628, the conclusions of the text were expressly approved; this was an action brought by a riparian proprietor to restrain a large number of mining companies who severally owned mines on the affluents of a river, which were worked independently of each other by the hydraulic process, from discharging their waste, earth, and other *debris* into the affluents of the stream, whence it flowed down into the river, to the injury of the complainant. The defendants demurred to the bill, on the express ground that the complainant's cause of action was distinct and several as against each of the defendants. In passing on the question thus raised, Sawyer, C. J., said: "I also think this bill maintainable against all the defendants on the jurisdictional ground of avoiding a multiplicity of suits. There is a common interest — a common, though not joint, right claimed; and the action on the part of all the defendants is the same in contributing to the common nuisance. The rights of all involve and depend upon identically the same questions, both of law and fact. It is one of the class of cases, like bills of peace and bills founded on analogous principles, where a single individual may bring a suit against numerous defendants, where there is no joint interest or title, but where the questions at issue and the evidence to establish the rights of the parties and the relief demanded are identical. Without analyzing and discussing the numerous cases upon the subject separately, this case appears to me to be clearly within the principle stated in and established by the following authorities." The learned judge then cites Pomeroy's Eq. Jur., §§ 256–269; and Mayor of York v. Pilkington, 1 Atk. 283; Sheffield W. W. v. Yeomans, L. R. 8 Ch. 8; Ware v. Horwood, 14 Ves. 28; Supervisors v. Deyoe, 77 N. Y. 219; Schuyler Fraud Cases, 17 N. Y. 592; Cent. P. Co. v. Dyer, 1 Saw. 650; Gaines v. Chew, 2 How. 642; and Oliver v. Piatt, 3 How. 412.

(e) **Cancellation.**— A leading case is Town of Springport v. Teutonia Savings Bank, 75 N. Y. 397. This was a suit for the cancellation of certain bonds issued by the plaintiff and held by numerous defendants. Ex-there are no decisions which positively deny the jurisdiction or the propriety of its exercise in cases belonging to either

trinsic proof would be required to show the invalidity of the bonds in defense to a suit thereon, but that fact, with the "mere ordinary danger of losing evidence" would not, according to the rule established in New York, be a sufficient ground for their cancellation. Rapallo, J., distinguishing the case of Town of Venice v. Woodruff, 62 N. Y. 462, 20 Am. Rep. 495, says (p. 402): "It was not intended to be denied that in the case of instruments creating a *prima facie* liability, and requiring an affirmative defense, to be supported by extrinsic proof of facts, the circumstance that they were held by numerous parties who might bring numerous suits upon them in different places, might under some circumstances be regarded as a ground for equitable interposition, even though, if there were but a single claimant, equitable relief would be denied and the party left to his legal defense, nor that where a party was subjected to or threatened with numerous vexatious actions, equity might not under proper circumstances restrain them." In the similar case of Farmington Village Corp. v. Sandy River Nat. Bank, 85 Me. 46, 26 Atl. 965, the jurisdiction was fully recognized but its exercise declined on the ground that no vexatious litigation appeared to be threatened. See also Brown v. Trousdale, 138 U. S. 389, 11 Sup. Ct. 308. In Louisville N. A. & C. R. Co. v. Ohio Val. I. & C. Co., 57 Fed. 42, 45, the plaintiff sued for the cancellation of its guaranty which had been indorsed upon several hundred bonds issued by another company illegally and fraudulently. The court was of the opinion that there was an adequate defense at law to a suit upon each bond, considered by itself, but that the multiplicity of suits threatened, and the common question involved of the validity of the guaranties and of the contract in pursuance of which they were made, rendered the case one for the exercise of its jurisdiction; quoting § 269 of the text, and citing Railway Co. v. Schuyler, 17 N. Y. 592; Supervisors v. Deyoe, 77 N. Y. 219; Waterworks v. Yeomans, L. R. 2 Ch. App. 11. This case was distinguished in Scott v. McFarland, 70 Fed. 280, where the numerous instruments sought to be canceled were obtained by distinct and separate acts of fraud, presenting no common question for decision.

(f) Quieting Title, etc., against Numerous Defendants.— The doctrine is applicable to a suit by an equitable owner of a large tract of land, to enforce and declare a trust against a large number of defendants, each claiming a distinct portion of the land, but under one fraudulent title: Dodge v. Briggs, 27 Fed. 160; and to an action to quiet title, brought by a person claiming title to a single piece of mining property, against numerous defendants, each of whom separately claims a distinct portion of the property, but all of whose claims are similar in origin, and the determination of which depends upon similar rules of law: Hyman v. Wheeler, 33 Fed. 630; and to an action brought by a landowner against a large number of defendants, each claiming a separate portion of the land under a void sale thereof made under the same order of court: De Forest v. Thompson, 40 Fed. 375, citing this chapter. See also Preteca v. Maxwell Land of them. The instances are few in which even any special or additional limitation has been placed upon the operation

Grant Co., (C. C. A.), 50 Fed. 674, citing this chapter; Lasher v. McCreery, 66 Fed. 834, 843, citing § 245, *supra;* Waddingham v. Robledo, 6 N. M. 347, 28 Pac. 663. In all these cases the jurisdiction was placed wholly or partly on the ground of avoiding a multiplicity of suits. A similar action has been sustained to *settle disputed boundaries* by one plaintiff against numerous defendants, owners in severalty of a certain tract of land, the boundaries of which, through the lapse of time, the carelessness of occupants, and the absence of natural monuments, had become confused and uncertain: Beatty v. Dixon, 56 Cal. 622. In this case the avoidance of a multiplicity of suits was decisive in favor of the jurisdiction. Central Pacific R. Co. v. Dyer, 1 Saw. 641, Fed. Cas. No. 2,552, was a statutory suit to quiet title against numerous defendants. By Mr. Justice Field: "The jurisdiction would, therefore, exist in the present case if there were only one defendant asserting an interest or estate adverse to the plaintiff, but the fact that there are numerous defendants claiming distinct and separate parcels by a similar title, and threatening distinct actions for injuries to their respective parcels, furnishes a further ground for entertaining the bill. A court of equity will always interfere to prevent a multiplicity of suits, where the rights of the parties can be fairly determined by a single proceeding." Citing Crews v. Burcham, 1 Black, 352; Mayor of York v. Pilkington, 1 Atk. 282; and Gaines v. Chew, 2 How. 640. See also Ellis v. Northern Pac. R. Co., 77 Wis. 114, 45 N. W. 811, where defendants deriving title from different sources were joined by a plaintiff seeking to quiet his title.

(g) Recovery of Specific Chattels.—One of the earliest of the American cases, and one of the most striking illustrations to be found in the books, is that of Vann v. Hargett, 22 N. C. (2 Dev. & B. Eq.) 31, 32 Am. Dec. 689 (1838). The bill alleged that the plaintiffs were owners of a remainder interest in certain slaves; that the life tenant had sold them, and that the numerous defendants had possession of some of the issue of the slaves, asserting an absolute title therein. The prayer was that the defendants might surrender the slaves or account for their value, if they had been sold. The case, therefore, presents a clear illustration of the "concurrent jurisdiction" as defined by the author, the relief demanded being purely legal in its nature. The defendants demurred on the ground that the plaintiffs had a remedy at law by action of trover or detinue, and on the ground of multifariousness. The opinion of Daniel, J., states the doctrine with admirable clearness. He says, in part: "The title of the plaintiffs seems to be admitted on both sides to be a legal title; we also think it is a legal title. But if the plaintiffs could by any possibility recover at law, that is not a reason sufficient, in a case like the one disclosed by this bill, why they may not also proceed in equity. The plaintiffs claim by, and seek to establish in themselves, one legal title to the slaves, as against each and all the numerous defendants now holding the same. . . . Lord Redesdale says, courts of equity will take take jurisdiction and prevent multiplicity of suits at law. And the of the doctrine, other than what is contained in the general rule itself defining its operation, which was stated in a for-

cases in which it is attempted, and the means used for that purpose, are various. With this view, where one general legal right is claimed against several distinct persons, a bill may be brought to establish the right. Mitford's Pleadings, 145." The judge there states the case of Mayor of York v. Pilkington, 1 Atk. 282 ("The Case of the Fisheries," *ante*, § 256), and the defendant's argument, that there jurisdiction existed against each defendant on the ground of continuous trespass, and that it was merely decided that the numerous defendants, each of whom might have been separately pursued in equity, were properly joined in a single suit. The court replies: "The answer which we give to this argument is, that the case put by the counsel is but one among many where equity will interfere to prevent a multiplicity of suits at law. The cases in which it is attempted, and the means for that purpose, 'are various,' says LORD REDESDALE. The case in Atkins is put as one among many in illustration of this rule. The object of a court of equity in entertaining such a bill, is to prevent multiplicity of suits at law by determining the rights of parties upon issues directed by the court, if necessary, for its information, instead of suffering the parties to be harassed by a number of separate suits, in which each suit would only determine the particular right in question between the plaintiff and the defendant in it. The notion, that equity interposes only to prevent a multiplicity of actions, *toties quoties* as the trespasses are committed, is answered again by stating, that such a bill can scarcely be sustained where a right is disputed between two persons only, until the right has been tried and decided at law. Mitford, 146." In other words, the defendants' counsel was mistaken in his assumption that in the "Case of the Fisheries" the court would have taken jurisdiction of a bill against each of the defendants separately. On the question of multifariousness the court says: "The court will not permit a plaintiff to demand by one bill several matters of different natures against several defendants; for this would tend to load each defendant with an unnecessary burthen of cost, by swelling the pleadings with the state of the several claims of the other defendants, with which he has no connexion. But a demurrer of this kind would hold only when the plaintiffs claim several matters of different natures. But when one general right is claimed by the bill, though the defendants have separate and distinct rights, a demurrer will not hold."

(h) Pecuniary Relief against Numerous Defendants.— The opinion in Bailey v. Tillinghast, 99 Fed. 801, 806, 807 (C. C. A.), is very instructive. This was a suit in equity by the receiver of a national bank against forty-six stockholders, for the purpose of recovering an assessment of $61 per share levied by the comptroller of the currency upon their personal liability on account of the stock held by them. By Severens, D. J.: "We are clearly of opinion that the bill should be maintained for the purpose of avoiding a multiplicity of suits. . . . There is a common question in the case between the receiver and the defendants, namely, the question whether mer paragraph;[1] namely, that if the plaintiff's right, interest, or estate in the subject-matter is contested, he is gen-

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[1] See *ante*, § 252.

the latter were released from their stock subscription by the fact that, whereas the resolution for increasing the stock in the sum of $300,000 was that under which their subscription took place, yet subsequently by proceedings to which they did not consent, the proposed increase was reduced to $150,000. . . . And these circumstances, namely, the great number of the parties on one side or the other, the identity of the question of law, and the similarity of facts in the several controversies between the respective parties, are the basis on which the jurisdiction rests. The object is to minimize litigation, not only in the interest of the public, but also for the convenience and advantage of the parties. If the receiver was compelled to bring separate suits, it would entail a vast expense upon the fund in trying over and over again the identical questions of law and fact with each stockholder, and with no substantial advantage to him, but injury, rather, in the increased cost in the immediate suit, and the larger burden upon the fund, created by the many suits against the others. Nor is it necessary, as counsel seem to suppose, that there should be any privity of interest between the stockholders, other than that in the question involved and the kind of relief sought, the right of their claims being common to them all, in order to bring the case within the jurisdiction [citing several of the cases mentioned in this chapter]. It is true there are occasional cases where it seems to have been supposed that there must be some community of interest, — some tie between the individuals who make up the great number; but the great weight of authority is to the contrary, and there is a multitude of cases which either in terms deny the necessity of such a fact or ignore it by granting relief where the fact did not exist. And, indeed, it is difficult to find any reason why it should be thought necessary. *It has no relevancy to the principle or purpose of the doctrine itself*, which stands not merely as a makeweight when other equities are present, but as an independent and substantive ground of jurisdiction." See also New York Life Ins. Co. v. Beard, 80 Fed. 66; Wyman v. Bowman, 127 Fed. 257, 262–265; Boyd v. Schneider, (C. C. A.), 131 Fed. 223, reversing 124 Fed. 239, and relying on author's text, § 245 (suit by depositors in bank against negligent bank directors). For limitations on the jurisdiction in cases of this character, see Hale v. Allinson, 188 U. S. 56, 23 Sup. Ct. 244, *ante*, § 251½.

(II) Joinder of Numerous Defendants against Each of Whom the Plaintiff has a Similar Cause of Action for Equitable Relief.—It has been frequently held that a riparian proprietor may restrain several tort feasors from diverting or polluting the waters of a stream, although they were not acting in unity of design or with concert of action; Woodruff v. North Bloomfield G. M. Co., 8 Saw. 628, 16 Fed. 25, citing this chapter; Union Mill & M. Co. v. Dangberg, 81 Fed. 73, 88; Lockwood Co. v. Lawrence, 77 Me. 297, 52 Am. Rep. 763, quoting § 269 of the text; Miller v. Highland Ditch Co., 87 Cal. 430, 22 Am. St. Rep. 254, 25 Pac. 550; Hillman v. Newington, erally required to establish it by an action at law, before he can invoke the aid of equity. As most of these cases have

57 Cal. 56; Draper v. Brown, 115 Wis. 361, 91 N. W. 1001; Graham v. Dahlonega Co., 71 Ga. 296. So a riparian proprietor on a private stream could maintain a single action against several defendants, each of whom acted independently of the others, but who claimed a common right to float logs down the stream, to restrain them from so doing, and to quiet his title as against all the defendants; Meyer v. Phillips, 97 N. Y. 485, 49 Am. Rep. 538. On the same principle an injunction has been granted in a suit by the owner of a large body of land, valuable only for its pasturage rights and privileges, to protect that right from use by cattle and stock-owners, neighbors of the land of complainant, under authority of an unconstitutional statute; Smith v. Bivens, 56 Fed. 352, 2 Ames Cas. Eq. Jur. 62; and in a suit by a railroad company to restrain numerous ticket "scalpers" or brokers from purchasing and reselling partly used tickets which by their terms were non-transferable; Nashville, C. & St. L. R. Co. v. M'Connell, 82 Fed. 65, 75, citing this chapter. In the three cases last cited it does not clearly appear that an injunction would have been granted against a single defendant; these cases may, therefore, be authority on the question of jurisdiction as well as of joinder. In a suit by a railroad company to protect its right of way against numerous land-owners who interfere with and deny its right, they may all be joined, when there is only one question to be settled. Louisville & N. R. Co. v. Smith (C. C. A.), 128 Fed. 1, 6, citing this chapter.

It is well settled that a creditor's bill may be maintained against several defendants, although they are not united in interest, to reach assets of the debtor in their several possession: Sheldon v. Packet Co., 8 Fed. 769 (Harlan, J.); Hayden v. Thrasher, 18 Fla. 795; Robinson v. Springfield Co., 21 Fla. 203, 238; Bobb v. Bobb, 76 Mo. 419; Rinehart v. Long, 95 Mo. 396, 8 S. W. 559; Parish v. Sloan, 3 Ired. Eq. (N. C.) 611. On the same principle the stockholders in a corporation may join in a single suit the grantees in distinct conveyances of the corporate property which they seek to cancel because made under an invalid resolution of the directors; Hardie v. Bulger, 66 Miss. 577, 6 South. 186. And an assignee in bankrutpcy may file his bill against all the incumbrancers of the bankrupt's property to ascertain the validity, priority, and amount of the incumbrances; McLean v. Lafayette Bank, 3 McLean, 415, 419, Fed. Cas. No. 8,886. In the last case it was distinctly held by Mr. Justice McLean that privity among the parties plaintiff or defendant is not necessary in a bill of peace, and it was pointed out that Dilly v. Doig, 2 Ves. Jr. 486, is wholly irreconcilable with the leading case of Mayor of York v. Pilkington, 1 Atk. 282 ("The Case of the Fisheries," *ante*, § 256). Equity has jurisdiction, partly on the ground of preventing a multiplicity of suits, of a suit by the receiver of an insolvent national bank against all its shareholders to recover dividends that have been unlawfully paid to them out of the capital of the bank at a time when the bank was insolvent. Hayden v. Thompson, 17 C. C. A. 592, 71 Fed. 60, 36 U. S. App. 361.

already been cited in connection with the foregoing affirmative discussion, I shall simply collect them here in the footnote.[2]

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[2] Hughlett v. Harris, 1 Del. Ch. 349, 352, 12 Am. Dec. 104; Richmond v. Dubuque, etc., R. R. Co., 33 Iowa, 422, 487, 488; Eastman v. Amoskeag, etc., Co., 47 N. H. 71, 79, 80; Eldridge v. Hill, 2 Johns. Ch. 281; West v. Mayor, etc., of N. Y., 10 Paige, 539. For the facts and particular points decided in these cases, see *ante*, in notes under §§ 252, 253, and 254. Richmond v. Dubuque, etc., R. R. Co., 33 Iowa, 422, 487, 488, contains the following *dictum* by Beck, C. J.: "It is said that equity will take jurisdiction of this case in order to avoid a multiplicity of suits between the parties. This is sometimes a ground for the exercise of chancery powers, but it is not of such controlling nature as to require the jurisdiction to be assumed even though other equitable principles are disregarded. The rule relied on is usually applied in cases where chancery has jurisdiction, for a proper purpose, of a subject-matter out of which grow other questions requiring adjudication. In such cases the parties will not be turned over to the law court which has cognizance of the matter, but it will be retained, that all rights relating thereto may be settled: 1 Story's Eq. Jur., §§ 64–67. We do not understand the mere fact that there exist divers causes of action, which may be the foundation of as many different suits between the parties thereto, is a ground upon which equity may be called upon to assume jurisdiction, and settle all such matters in one suit. The case would not be different if some of the causes of action were not matured. We have never heard it claimed that equity will entertain an action upon a contract requiring the payment of money daily, monthly, or yearly. Yet in such a case an action would accrue at each of such periods, and there would thus be prospectively a great multiplicity of actions. In the case before us, admitting the contract to be divisible, and that an action may be maintained upon every breach, this is no ground for interference by a court of chancery. If the contract be divisible, and the plaintiff has a right of action thereon to recover money accruing every day, equity cannot take the right from him, and substitute a remedy which will award him damages in gross for the whole amount which he may ultimately recover." This case was an equitable action to compel the specific performance of a long and complicated agreement, extending in its operation over several years, and containing numerous provisions, but relating wholly to personal services and personal property. The plaintiff claimed, among other arguments, that equity had jurisdiction to prevent a multiplicity of suits, since from the continuous nature of the agreement, and the number and variety of its provisions, there would be many breaches, and consequently many actions at law to recover damages. The decision that such a case does not come within the doctrine as to preventing a multiplicity of suits, since the plaintiff's remedy at law is adequate, simple, and certain, is plainly correct. The correctness of the learned judge's remarks concerning the origin and nature of the jurisdiction in general to prevent a multiplicity of suits is much more doubtful.[a]

(a) In Attorney-General v. Board of Education (Mich.), 95 N. W. 746, it was held that the avoidance of a multiplicity of suits was no ground for injunction against the breach of a continuing contract when the plain-

§ 264. **In the Third and Fourth Classes.**[a]— I pass, then, to the denial or the restrictions and limitations of the doctrine in its application to cases of the third and fourth classes. There are instances of such absolute denial, or of stringent limitations, in suits brought by a number of persons to establish some individual but common right existing on behalf of each and all, against a single wrong-doer or trespasser; or brought by a single plaintiff to restrain a number of simultaneous actions commenced against him by different persons, upon the allegation that they all involved similar facts, and depended upon the same questions of law, and therefore had a common nature. In these cases the jurisdiction was denied, on the ground that there was no privity or legal relation or community of interest and right among the individuals of the numerous body, which, it was held, must exist in order that a court of equity may interfere, under such circumstances, for the purpose of preventing a multiplicity of suits.[1] [b] My critical examination of these cases is placed in the foot-note, where it is shown that with respect to their material facts they are clearly distinguishable from all those adjudications, quoted under the foregoing paragraphs, by which the jurisdiction has been asserted and exercised, so

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[1] County of Lapeer v. Hart, Harr. (Mich.) 157; Marselis v. Morris Canal Co., 1 N. J. Eq. 31, 35–39. In County of Lapeer v. Hart, Harr. (Mich.) 157, sixty-seven actions at law had been begun, against the county supervisors on certain drafts or orders for the payment of money in various sums issued by them, and owned by the respective plaintiffs in said actions, individually. These orders had all been issued by the supervisors in pursuance of the same supposed authority, and in the same proceeding. An action was brought by each holder to recover the amount of his order. Whatever defense the county had in each action was wholly legal. The county thereupon filed this bill in equity against all the holders of said orders, seeking to restrain their actions at law, and to have the orders declared void, etc. It was held that no such suit could be maintained by the county, since there was no common interest among the order holders; it was not a case which came

tiff might wait until the term of the contract had expired and then bring a single action at law.

(a) Sections 264–269 are cited in American Cent. Ins. Co. v. Landau, 56 N. J. Eq. 513, 39 Atl. 400, a case recognizing the author's "third class."

(b) **Cases of the Fourth Class Denying the Jurisdiction.**— The following cases deny the jurisdiction with more or less emphasis; but most of them are distinguishable as cases where the exercise of the jurisdiction was unnecessary, or would be ineffectual. Swift v. Larrabee, 31 Conn. 225, 239 (*dictum*); Equitable Guarantee, etc., Co. v. Donahoe (Del.), 45 Atl. 583; Doggett v. Hart, 5 Fla. 215, 58 Am. Dec. 464; Hughes v. Hannah, 39 Fla. 365, 22 South. 613 (bill of peace does not lie to

within the principle of a "bill of peace," or of preventing a multiplicity of suits. The opinion in Marselis v. Morris Canal Co., 1 N. J. Eq. 31, is one of the most carefully considered and elaborate presentations of this restricted and negative view of the doctrine to be found in the reports, and I shall therefore quote from it at some length. Many separate owners of distinct tracts of land along the line of the defendant's canal united as plaintiffs, suing on behalf of themselves and all others, etc., charging that the defendant entered on their separate parcels of land and dug a canal, without permission or agreement, and without making any compensation; that defendant was insolvent. They prayed an account of damages for the injuries done, compensation for the lands taken, and an injunction to restrain the defendant from occupying or using their lands without compensation. Defendant demurred to the whole bill, and plaintiffs moved for a preliminary injunction, and the argument of both came on together. The chancellor said (pp. 35–39): "The complainants are several owners having distinct rights in the several tracts of land through which the canal passes. The injuries sustained by one of them have no necessary nor natural connection with those sustained by another. Admitting the jurisdiction of the court, each of these complainants might sue separately, either in a court of law or of equity, without consulting with any other one, and without in the least degree affecting his rights. On the other hand, the suit is brought by all of them against one common defendant. They all complain of injuries similar in their character, and seek a similar relief, and therefore have a common object in view. Complainants allege that the suit is brought for the benefit of all land-owners who will come in and contribute. Such is the complainants' case. Let us ex-

quiet title against numerous defendants in possession); Peninsula Const. Co. v. Merritt, 90 Md. 589, 45 Atl. 172; Zahnhizer v. Hefner, 47 W. Va. 418, 35 S. E. 4; Tribette v. Illinois Cent. R. Co., 70 Miss. 182, 12 South. 32, 19 L. R. A. 660, 35 Am. St. Rep. 642, 1 Keener Cas. Eq. Jur. 148, 2 Ames Cas. Eq. Jur. 74; Ducktown, etc., Co. v. Fain, 109 Tenn. 56, 70 S. W. 813. In Peninsula Const. Co. v. Merritt, *supra*, it was held that equity would not take jurisdiction to enjoin numerous garnishment proceedings against the complainant, to all of which he had the same defense, that he owed nothing to the common debtor. In Zahnhizer v. Hefner, *supra*, the court refused to take jurisdiction to enjoin several attachments on goods claimed by the plaintiff, who was not a party to the attachment suits. The decision is partly rested, however, on the adequacy of the statutory remedy by which the plaintiff might reclaim his property. In other West Virginia cases the jurisdiction as contended for by the author has been fully recognized. In Equitable Guarantee, etc., Co. v. Donahoe, *supra*, a case of the fourth class, the jurisdiction was invoked to restrain taxation; for a statement of the case see *post*, § 266, note. The opinion in Tribette v. Illinois Cent. R. Co., *supra*, is so sensational in many that there is no conflict between the *decisions* as actually made. With the judicial opinion, however, it is otherwise. Laying out of view the groups of cases concerning assessments, and taxes, and public burdens, with respect to which

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amine some of the leading authorities for the principle that should govern it. In Bouverie v. Prentice, 1 Brown Ch. 200, Lord Thurlow held that where a number of persons claim one right in one subject, one bill may be sustained to put an end to suits and litigation. That was the case of a bill filed by the lady of a manor against several tenants for quitrents due, and the method was adopted to prevent multiplicity of suits. But it was not considered as coming within the principle laid down by the courts. The lord chancellor remarked that no one issue could try the cause between any two of the parties (defendant); and he could not conceive upon what principle two different tenants of distinct estates should be brought before him together to hear each other's rights discussed. In Ward v. Duke of Northumberland, 2 Anstr. 469, the court says that the cases where unconnected parties may join in a suit are, where there is one common interest among them all, centering in the point in issue in the cause. Lord Redesdale, in Whaley v. Dawson, 2 Schoales & L. 367, held this principle, that where there was a general right claimed by the bill covering the whole case, the bill would be good, though the defendants had separate and distinct rights; but if the subjects of the suit were in themselves perfectly distinct, a demurrer would be sustained. The same rule is recognized in Saxton v. Davis, 18 Ves. 72; in Hester v. Weston, 1 Vern. 463; and in Mayor of York v. Pilkington, 1 Atk. 282. In Cooper's Eq. Pl. 182, this rule is given: 'The court will not permit several plaintiffs to demand by

of its statements, and has been so frequently reprinted, that it appears to call for special notice. Campbell, C. J., states the facts as follows: "A number of different owners of property in the town of Terry, destroyed by fire from sparks emitted by an engine of the appellee, severally sued in the circuit court to recover of the appellee damages for their respective losses by said fire, alleged to have resulted from the negligence of the defendant. While these actions were pending, the appellee exhibited its bill against the several plaintiffs, averring that no liability, as to it, arose by reason of the fire, which arose, not from any negligence or wrong of it or of its servants, but from the fault of others, for which it is not responsible; and that the plaintiffs in the different actions are wrongfully seeking to recover damages by their several actions, all of which grew out of the same occurrence, and depend for their solution upon the same questions of fact and of law. Wherefore, to avoid multiplicity of suits, and the consequent harassment and vexation, all of the said plaintiffs are sought to be enjoined from prosecuting their different actions, and to be brought in and have the controversies settled in this one suit in equity. There is no common interest between these different plaintiffs, except in the questions of fact and law involved." Campbell, C. J., asserts that on the facts as thus stated "the granting and maintaining the injunction are fully sustained by Pomeroy Eq. Jur., Vol. 1, § 255 *et seq.*" With this the editor agrees, if the bill really prethere has been so much antagonism on the part of the courts, there is much in these opinions, in the course and tendency of their reasoning, and in the rules which they lay down as tests of the jurisdiction, which conflicts directly and unmis-

one bill several matters perfectly distinct and unconnected against one defendant; nor one plaintiff to demand several matters of distinct natures against several defendants.' And to exemplify the rule, the following case is given from 2 Dick. 677: If an estate was sold in lots to different persons, the purchasers could not join in one bill against the vendor for a specific performance; for each party's case would be distinct, and would depend upon its own peculiar circumstances, and there must be a distinct bill upon each contract. Nor could such vendor, on the other hand, file one bill for a specific performance against all the purchasers. Lord Kenyon, in Birkley v. Presgrave, 1 East, 227, gives the same illustration; and adds that, in general, a court of equity will not take cognizance of distinct and separate claims of different persons in one suit, though standing in the same relative situation. In the case of Brinkerhoff v. Brown, 6 Johns. Ch. 139, Chancellor Kent reviews the leading authorities, and comes to this conclusion, that a bill filed against several persons must relate to matters of the same nature, and having a connection with each other, and in which all the defendants are more or less concerned, though their rights in respect to the general subject of the case may be distinct." The chancellor then remarks that suits by creditors, legatees, etc., depend upon the principle that there is such a *privity* between them that a complete decree may be made determining the rights of all. Also cases of lord and tenants concerning the common rights, of parson and parish-

sented the single question, a denial of the complainant's negligence. But it appears from the briefs of counsel that the point was argued, that numerous unrelated issues of fact were presented, which the suit in equity would not avail to lessen. Neither the court nor the reporter enlightens us further as to the facts of the case; but it is evident that if the complainant's real defense to the plaintiffs' suits was, say, contributory negligence on the part of the several plaintiffs, a separate issue with each of them could not be avoided by removing the cases to a court of equity. The *decision* of the court would then be unquestionably correct. See *ante*, § 251½. The opinion, however, consists of a sweeping denial of the author's conclusions as to classes third and fourth. Says the learned chief justice: "*There is no such doctrine in the books* (!), and the zeal of the learned and usually accurate writer mentioned, to maintain a theory, has betrayed him into error on this subject. . . . Every case he cited to support his text will be found to be either where each party might have resorted to chancery or been proceeded against in that forum, or to rest on some recognized ground of equitable interference other than to avoid multiplicity of suits. The cases establish this proposition, viz.: Where each of several may proceed or be proceeded against in equity, their joinder as plaintiffs or defendants in one suit is not objectionable; but this is a very different question from that, whether, merely because many actions at law arise out of the same transaction or occurrence, and detakably with the doctrines and rules necessarily contained in numerous well-settled and well-known authorities, both English and American. All attempt to reconcile or to pronounce upon this contradiction is postponed to a subsequent paragraph.

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ioners concerning a *modus*, and some others, are, as he asserts, governed by the same notion. He proceeds: "These last may, with more propriety, be classed under that branch of equity which relates to bills of peace. These bills have no affinity with the one now before the court. It is true, the legitimate object of them is to avoid a multiplicity of suits; and the ancient practice of the court was, not to interfere until the legal right had first been tried at law in an individual case; after which the court of equity would interfere to quiet that right by injunction. This is not a bill of peace, and I believe it has not been contended that a land-owner in the county of Warren or Morris, not coming in and making himself a party to this suit, would be in any wise affected by it. I think the principle laid down in Cooper is the correct one, that it is fairly deducible from the cases, and must govern this. According to that principle, I feel constrained to say that the bill cannot be sustained. There is no kind of privity between these complainants; there is no general right to be established as against the defendant, except the general right that the wrong-doer is liable to answer for his misdeeds to the injured party, which surely does not require to be established by such a proceeding as this. The utmost that can be said is, that the defendant stands in the same relative position to all these complainants. There is no common interest in them centering in the point in issue in the cause, which is the rule in 2 Anstruther. Nor is there any general right claimed by the bill

pend on the same matters of fact and law, all may proceed or be proceeded against jointly in one suit in chancery; and it is believed that it has never been so held, and never will be, in cases like those here involved," etc. It may be remarked, in passing, that the language italicized is a severe reflection upon the learned judge's own court, which, only nine years before, rendered a decision, concurred in by this same judge, adopting the author's conclusions and applying them to a case which, as the court then admitted, presented no other possible ground of jurisdiction; Pollock v. Okolona Sav. Inst., 61 Miss. 293, *ante*, note to § 261, Class Fourth, (I), (c). We have already shown that the statement and proof of the rules of equity relating to joinder of parties forms a vital and necessary part of the author's argument. *Ante*, note (c) to § 257. In regard to the cases selected by Campbell, C. J., for special animadversion we may observe: that if Osborne v. Wisconsin Cent. R. Co., 43 Fed. 824, *ante*, note to § 261, Third Class, (I), (a), was a case in which each plaintiff "might have brought his separate bill to quiet title," there is nothing in the opinion of Harlan, J., from which that fact may be inferred; that in Keese v. Denver, 10 Colo. 112, 15 Pac. 825, *ante*, note (b) to § 259, the demurrer was both to the misjoinder and to the want of equity in the complaint, and in overruling it the text was cited on both grounds; that in Carlton v. Newman, 77 Me. 408, the court states in the plainest and most emphatic man-

§ 265. In Cases of Illegal Taxes and Public Burdens.— I pass to cases concerning local assessments, general taxes, and public debts or burdens. The line of decisions has already been mentioned, where, upon an equity suit brought in most instances by one proprietor, to restrain or to set aside some

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covering the whole case, which is the principle adopted by Lord Redesdale. Chancellor Kent's rule is quite as broad as any authority will warrant, but it is not broad enough for the case now before the court. It requires that a bill against several persons must relate to matters of the same nature, and having a connection with each other, and in which all the defendants are more or less concerned." In whatever manner we may regard the general course and tendency of the chancellor's reasoning in this opinion, it is very evident that the *actual decision* made upon the facts does not in the slightest degree conflict with any of the cases heretofore quoted, in which the jurisdiction has been exercised. The facts of this case clearly distinguish it from each and all of them. Although on the first superficial view there may *appear* to be the same community, since the single defendant was all the time prosecuting one enterprise, viz., constructing its canal, yet in the case of each plaintiff there was a *separate, distinct trespass upon his land;* the claim of each land-owner resulted from a separate injury to his own property, unconnected with the injuries done to the others. This is the vital distinction in the facts which removes this case from the operation of the doctrine. In the group of decisions where many land-owners have united in a suit to restrain a trespass or a nuisance, such as a diversion of water from their mills, or an erection blocking up a passage to all their buildings, *the one wrongful act* of the defendant, *uno flatu*, did the injury complained of to the land of each

ner that illegality is no ground for enjoining a tax at the suit of the single plaintiff, and bases the injunction squarely on the author's text; that in De Forest v. Thompson, 40 Fed. 375, Jackson, J., and Harlan, J., so far from holding that "a bill might have been exhibited against each defendant separately," concede that as against each defendant, separately considered, the remedy at law would have been adequate; that in New York, etc., R. R. Co. v. Schuyler, 17 N. Y. 592, the court expressed the opinion that the suit could be sustained as a bill of peace, even if there were no other element of equity jurisdiction. But the author's critic even ventures the astounding assertion that Sheffield Water Works v. Yeomans, L. R. 2 Ch. 8, *ante*, note to § 256, "furnishes no sort of support to the text of the author." The case in question, constantly relied on as one of the strongest authorities in support of the doctrine, is too plain and simple to admit of misconception. The learned chief justice admits that the author's text has frequently been cited or quoted by the courts; but claims that all these cases are "resolvable upon other grounds of equitable interference." An examination of the recent cases cited, *ante*, in note to § 261, will show that this claim is true of only a few of these decisions.

The opinion in the "Tribette case" was followed in Duckworth, etc., Co. v. Fain, 109 Tenn. 56, 70 S. W. 813; but in the latter case the exercise of the jurisdiction would clearly have illegal assessment or tax which imposed a lien or liability upon the plaintiff and others in the same position, the court has held that it would exercise its jurisdiction and grant the relief only where such judicial action was necessary to prevent a multiplicity of suits, or to remove a cloud from title, or to avoid irreparable mischief. These decisions therefore assert affirmatively that a court of equity *may* relieve from illegal assessments and taxes on the ground of preventing

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plaintiff; in that group where many lot-owners united to obtain relief from an illegal assessment, the one official act of the municipality placed an unlawful burden on the lot of each plaintiff, and by this single wrong all of the lot-owners sustained their individual but common injuries. The same is true in the suits by tax-payers to be relieved from an illegal tax or public debt. In the present case, the transaction was otherwise, both in form and in its nature. There was no single wrongful act of the canal company, which by its comprehensive nature produced the same injury upon the land of each proprietor. On the contrary, the company committed a separate and wholly independent trespass upon the land of each by itself, and these trespasses were not simply distinct in contemplation of law, but they were different in their form, nature, and extent. It necessarily follows, therefore, that there was not among the plaintiffs even any *community of interest in the relief sought, nor in the questions* at issue, which, it is conceded, must exist in order that the court may interfere, and which did exist in all the groups of cases heretofore cited. The decision of the chancellor was therefore unquestionably correct; but I cannot accept the whole course and tenor of his reasoning as equally correct. It is the case, not uncommon, of a judge who seeks to sustain a foregone conclusion by giving an imperfect construction or improper bias to the authorities which he cites.(c) The very recent case of Board, etc., v. Deyoe, 77 N. Y. 219, is directly contrary to County of Lapeer v. Hart, Harr. (Mich.) 157.

been ineffectual, within the principle of § 251½, *ante.* The Mississippi court has since abandoned its extreme position; the "Tribette case" was first distinguished in Illinois Central R. Co. v. Garrison, 81 Miss. 257, 95 Am. St. Rep. 469, 32 South. 996, where the plaintiff successfully asserted in equity a "common right," the character of which is not disclosed, against the unconnected claims of numerous suitors; and afterwards was tacitly overruled in Hightown v. Mobile, J. & K. C. R. Co. (Miss.), 36 South. 82, and Tisdale v. Insurance Co. of N. A. (Miss.), 36 South. 568, cases of the "third class," in neither of which was there any possible pretense of connection among the numerous plaintiffs, except with reference to the questions of fact and law involved.

Cases of the Third Class Denying the Jurisdiction.— See *post,* § 267, note.

(c) For many further instances where the court refused to interfere because there was no "community of interest in the relief sought, nor in the questions at issue," see *ante,* § 251½, and notes.

a multiplicity of suits; but they make no attempt to determine when or under what circumstances such ground for its interference would exist; and they all hold that the mere facts of the assessment or tax being illegal and of its creating an illegal personal liability or unlawful lien, and of its affecting numerous tax-payers and owners in the same manner, do not furnish the ground for equitable interference, nor bring the case within the jurisdiction based upon the prevention of a multiplicity of suits.[1] [a]

§ 266. The cases, however, to which I now refer go much further than these. There are well-considered adjudications of several courts, certainly among the ablest courts of this country, which hold that, as a general rule, or except under very special circumstances, a court of equity will not exercise its jurisdiction and grant relief upon the doctrine of preventing a multiplicity of suits in a suit brought by a single tax-payer and property owner, or by one or more suing on behalf of himself and others, or by many individuals united as co-plaintiffs to restrain the enforcement of, or to set aside and annul, or to be otherwise relieved from, any local municipal assessment, or any tax, purely personal or made a lien on property, laid by a county, town, city, or other district, or any official act, proceeding, or transaction of a county, town, city, or district, whereby a public indebtedness is or would be created, and the burden of taxation is or would be enhanced, upon the ground that such assessment, tax, official proceeding, or public debt was illegal, and either voidable or void. These cases therefore present a direct conflict of judicial opinion with those quoted in the preceding paragraphs. The most important reasons given by the courts in support of the general conclusion which they all reach are placed in the accompanying footnote.[1] [a]

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[1] See *ante*, § 259; Mayor, etc., of Brooklyn v. Meserole, 26 Wend. 132, 140; Heywood v. Buffalo, 14 N. Y. 534, 541; Guest v. Brooklyn, 69 N. Y. 506, 512, 513; Bouton v. Brooklyn, 15 Barb. 375, 387, 392; Ewing v. St. Louis, 5 Wall. 413, 418; Dows v. Chicago, 11 Wall. 108, 110, 111; Scribner v. Allen, 12 Minn. 148; Minnesota Oil Co. v. Palmer, 20 Minn. 468; White Sulphur Springs Co. v. Holley, 4 W. Va. 597; Harkness v. Board of Pub. Works, 1 McAr. 121, 131–133. It should be observed that almost all of these cases, I believe with hardly an exception, are avowedly decided upon the authority of the opinion given in Mayor v. Meserole, 26 Wend. 132, and the other New York cases following and adopting it.

(a) Cited, Strenna v. Montgomery, 86 Ala. 340, 5 So. 115. See also Schulenberg-Boeckeler Lumber Co. v. Town of Hayward, 20 Fed. 422 (distinguished *ante*, § 251½); People's Nat. Bank v. Marye, 107 Fed. 570; Murphy v. City of Wilmington, 6 Houst. (Del.) 108, 22 Am. St. Rep. 345; Wilkerson v. Walters, 1 Idaho, 564; Bradish v. Lucken, 38 Minn. 186, 36 N. W. 454; Coulson v. Harris, 43 Miss. 728, 754 ff.; Hoboken L., etc., Co. v. City of Hoboken, 31 N. J. Eq. 462; Dyer v. School District, 61 Vt. 96, 17 Atl. 788.

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[1] I have arranged these cases into classes according to their subject-matter; and those in each class, wherever possible, according to their forms, viz., those brought by or on behalf of numerous plaintiffs, and those by a single plaintiff suing alone.

Cases concerning some public official action not directly involving taxation: Doolittle v. Supervisors, 18 N. Y. 155; Roosevelt v. Draper, 23 N. Y. 318.

Cases concerning local assessments by numerous lot-owners: Dodd v. Hartford, 25 Conn. 232, 238; Howell v. City of Buffalo, 2 Abb. App. 412, 416; Bouton v. Brooklyn, 15 Barb. 375, 387, 392–394.

Cases concerning taxes or proceedings which would create a public debt, and thus increase taxation,— 1. *By numerous tax-payers:* Youngblood v. Sexton, 32 Mich. 406, 20 Am. Rep. 654; Sheldon v. School District, 25 Conn. 224, 228; Harkness v. Bd. of Pub. Works, 1 McAr. 121, 127–133; Kilbourne v. St. John, 59 N. Y. 21, 27, 17 Am. Rep. 291; Ayres v. Lawrence, 63 Barb. 454; Tift v. Buffalo, 1 Thomp. & C. 150; Comins v. Supervisors, 3 Thomp. & C. 296; Barnes v. Beloit, 19 Wis. 93; Newcomb v. Horton, 18 Wis. 566, 568, 569; Cutting v. Gilbert, 5 Blatch. 259, 261–263. 2. *By a single tax-payer:* Phelps v. Watertown, 61

(a) The recent case of Equitable Guarantee & T. Co. v. Donahoe (Del.), 45 Atl. 583, is noteworthy for its statement of those motives of public policy which, in many states, serve to prevent the operation of the jurisdiction in matters of taxation. The complainant, a trust company, sought to restrain the collection of an alleged illegal personal tax, on the ground that it was trustee or guardian in a large number of estates and would be involved in a multiplicity of suits if it paid the tax. Nicholson, Ch., referring to this chapter, but declining to discuss the scope of the doctrine here laid down, bases his refusal of relief on several grounds; viz., (1) that the equitable jurisdiction in Delaware is restricted by the constitution to cases where there is not sufficient remedy by common law or statute; (2) that the complainant stood in no real danger of repeated litigation, as it was probable that the tax collector would abide by the result of a single suit at law; quoting Fellows v. Spaulding, 141 Mass. 92, 6 N. E. 549, and Express Co. v. Seibert, 44 Fed. 315; (3) motives of public policy. The chancellor observes with much force, "As society becomes

§ 267. **Summary of Conclusions.**— The theories concerning the doctrine advocated by different judges, and the conclusions reached by different decisions, have been so fully explained, compared, and examined in the accompanying foot-notes, that I only need state here in the text the propo-

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Barb. 121, 123; Ayres v. Lawrence, 63 Barb. 454; White Sulphur Springs Co. v. Holley, 4 W. Va. 597. The cases of Doolittle v. Supervisors, 18 N. Y. 155, and Roosevelt v. Draper, 23 N. Y. 318, are in some respects leading. They have exerted a marked influence, and have even been controlling upon many of the subsequent decisions, but, in my opinion, through a misapprehension of their true significance and effect, since they really have no legitimate connection whatever with the equitable jurisdiction based upon the prevention of a multiplicity of suits. The *rationale* of the decision — the *ratio decidendi* — in each consisted solely in motives of public policy and governmental expediency. They hold that when local officers, as of a county or a city, having *quasi* legislative and administrative functions, do some official act which is illegal or in excess to their powers, an individual citizen, who suffers thereby only the injuries which are sustained in common by all other members of the community,— that is, who suffers no special injury, and nothing which is not also suffered alike by all other citizens of the district,— has no cause of action whatever, either legal or equitable, no right to any remedy from a court of justice. His only relief is an appeal to the legislature to obtain, if possible, a correction of the wrong, or an exercise of the elective franchise, by which perhaps other and better officers may be chosen. Certain passages of the opinions may, when isolated from their context, seem to go some further; but this is the true force and effect of these celebrated cases. No question could arise whether, under such circumstances, many citizens could unite as co-plaintiffs, or one could sue on behalf of others, since no one had any right which a court of justice could recognize. I have thus explained the true value of these decisions, because they obviously lie at the foundation of many of the cases cited in this note, in which courts have pronounced against the claims

more and more complex, and interests become more and more interlaced, the value and necessity of equity's preventive remedies becomes greater. But, just as their beneficent possibilities have increased in consequence of the magnitude of the evils to be averted by their legitimate use, so in exact proportion has the possible mischief increased that may be caused by their illegitimate use. The English and American equitable jurisprudence is a unique system; a complex interweaving of principle and precedent, of reason and experience. It has progressed by slow and careful steps, guided always by careful observation of the practical consequences of what had been done already. And in no department has the adherence to precedent been so marked, in no sphere of action does it behoove the equity judge to be so careful 'to keep within the ancient merestones,' as when there is question of wielding the tremendous power of the injunction process." The chancellor distinguishes the case of Cummings v. Bank, 101 U. S. 153, *ante*, note to § 261, on several grounds, and cites many cases denying the jurisdiction to restrain illegal personal taxes.

sitions as to the extent and operation of the doctrine which, in my opinion, appear to be supported by principle and by authority. With respect to cases of the first and the second classes, where the whole judicial controversy is always be-

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of tax-payers. That they really differ most essentially, in their most vital principle, from these latter cases is evident from the fact universally conceded that a tax-payer upon whom an illegal tax has been imposed has *some* cause of action, some remedial right; he has, at least, the right to maintain an action at law to recover damages when an illegal tax has been enforced. There is therefore a fundamental difference between him and the citizen mentioned in Doolittle v. Supervisors, 18 N. Y. 155, and Roosevelt v. Draper, 23 N. Y. 318; and the principle established by those cases has no legitimate application to the questions concerning the equitable jurisdiction to grant relief to a body of tax-payers.

In Howell v. Buffalo, 2 Abb. App. 412, 416, it was held that a suit by numerous owners of separate lots to set aside an illegal assessment does not come within the equity jurisdiction to prevent a multiplicity of suits; the plaintiffs cannot unite in an equitable action merely to avoid the necessity of separate actions. The court gave the following theory of the doctrine as the reason for their conclusion: "It is not a case for the application of the rule for the prevention of a multiplicity of suits. *No one of the plaintiffs is threatened with many suits or much litigation.*" I need only remark, that if this test of the doctrine be correct, then many English and American judges have often fallen into grievous error. In Dodd v. Hartford, 25 Conn. 232, 238, a similar suit upon similar circumstances, the same ruling was made, on the ground that each plaintiff had an adequate remedy at law.

Youngblood v. Sexton, 32 Mich. 406, 410, 20 Am. Rep. 654, was a suit by numerous tax-payers to enjoin the collection of a personal tax claimed to be illegal. Held to be settled in Michigan that in case of such a personal tax equity has no jurisdiction to restrain its collection, even if illegal, the ordinary remedy by action at law being adequate. Cooley, J., said (p. 410): "The jurisdiction cannot be rested on the doctrine of preventing a multiplicity of suits, because the principles that govern that jurisdiction have no application to this case. It is sometimes admissible when many parties are alike affected or threatened by one illegal act, that they shall unite in a suit to restrain it; and this has been done in this state in the case of an illegal assessment of lands: Scofield v. Lansing, 17 Mich. 437. But the cases are very few and very peculiar, unless each of the complainants *has an equitable action* on his own behalf. Now, the nature of this case is such that each of these complainants, if the tax is invalid, has a remedy at law, which is as complete and ample as the law gives in any other cases. He may resist the sheriff's process as he might any other trespass; or he may pay the money under protest, and at once sue for and recover it back. But no other complainant has any *joint interest with him* in resisting this tax. The sum demanded of each is distinct and separate, and it does not concern one of the complainants whether another pays or not. All the joint interest the parties have is a joint interest in a question of law; just such an interest as might exist in any case where separate demands are made of several tween one distinct party complaining and one party defendant, there is no substantial disagreement; the rule has been settled with unanimity. The only apparent exception consists in the fact that formerly the courts of equity required

persons. [Gives one or two examples.] We venture to say that it would not be seriously suggested that a common interest in any such question at law, when the legal interests of the parties were wholly distinct, could constitute any ground of equitable jurisdiction, where the several controversies affected by the question were purely legal controversies. Suits do not become of equitable cognizance because of their number merely. This was affirmed in Lapeer Co. v. Hart, Harr. (Mich.) 157, and in the two cases of Sheldon v. School Dist., 25 Conn. 224, and Dodd v. Hartford, 25 Conn. 232. In these cases the single assessment of a school tax was involved, and the parties concerned, if permitted to unite, might have had the whole controversy determined in one suit. In this case, the controversy is either separate, as the tax is several against each individual; or it is general, as it affects all the persons taxed under the law"; citing also Jones v. Garcia, 1 Turn. & R. 297, and Yeaton v. Lenox, 8 Pet. 123, and Adams's Equity, 198–202.[b] I have thus quoted at some length from Judge Cooley's opinion, because it is one of the clearest statements of the theory which it supports to be found in the reports. It should be observed that he nowhere adopts the test laid down by some judges, that *each of the numerous persons must himself be exposed to many actions*, in order that a court of equity may interfere. With respect to the reasoning of the opinion, it would, if correct, overturn at one blow many well-settled cases not relating to taxation, in which the jurisdiction has been asserted both by English and American courts. For example, it has been held that one copyholder cannot maintain a suit in equity against his lord of the manor, to enjoin or to set aside an excessive fine, because the question is legal, and the defense would be perfectly available to him in an action at law brought to recover the fine. But numerous copyholders or all copyholders of the manor may unite in a bill in equity to set aside excessive fines imposed on each, for the purpose of avoiding a multiplicity of suits. I cannot perceive any material distinction, or why every position of Judge Cooley's opinion would not apply to and contradict this case. Many more examples might be given from cases quoted in preceding paragraphs. The objection that the primary remedy of each tax-payer is *legal* is certainly too broad; for it would deny the jurisdiction in the vast majority of cases where it is confessedly proper and universally admitted. The chief object of the jurisdiction, the fundamental ground and reason for its existence, is, that it furnishes a complete and final remedy by one equitable decree to parties whose primary rights, cause of action, and remedies are wholly legal, either to a single party who must otherwise maintain or be subjected to numerous ac-

(b) It has been observed that "Judge Cooley in his work on Taxation in the edition of 1879, in effect, admits that his views as above expressed are opposed to the decided weight of authority." Williams v. County Court, 26 W. Va. 488, 503, 53 Am. Rep. 94, by Green, J., criticising Youngblood v. Sexton.

the complainant to establish his disputed legal estate, interest, or primary right by *repeated* recoveries at law, whereas *one* successful trial at law is now generally regarded as sufficient. It is also possible that there might still

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tions at law, or to a body of persons, where each of them must otherwise maintain or be subjected to a similar action at law. Sheldon v. School District, 25 Conn. 224, 228, was a suit by thirty-nine tax-payers to enjoin the enforcement against them of an illegal school tax. Held, that each plaintiff had an adequate remedy at law, and the case did not come within the doctrine as to the prevention of a multiplicity of suits. The court said: "The mere saving the expense of separate suits is no ground for the plaintiffs uniting in a bill in equity to obtain an injunction against the doing of an act which would give each of them a right of action at law." The Connecticut court seems to have subsequently abandoned this position, for it has since, in several instances, sustained such actions on behalf of tax-payers. See cases cited *ante*, under § 260. In Harkness v. Board of Public Works, 1 McAr. 121, 131–133, it was held that equity will set aside an illegal tax assessed on the property of a tax-payer, when necessary,— 1. To remove a cloud from his title; or 2. To avoid irreparable mischief; or 3. To prevent a multiplicity of suits. But that when individual tax-payers have been assessed under an illegal tax on property owned by them separately, and they unite in an action, this is not a case coming within the doctrine as to the prevention of a multiplicity of suits, and equity has no jurisdiction. The opinion gives different reasons, and does not show very clearly on what ground the court places its conclusion. While it seems to use arguments similar to those employed by Judge Cooley, *supra*, the adequacy of the legal remedy, the absence of any joint interest, etc., it also seems to rely chiefly on the theory that each tax-payer is only injured in common with all others, and that he, therefore, has *no* cause of action or remedial right which any court of justice can recognize and protect. See *supra*.

The New York cases, Kilbourne v. St. John, 59 N. Y. 21, 27, 17 Am. Rep. 291, Ayres v. Lawrence, 63 Barb. 458, Tift v. Buffalo, 1 Thomp. & C. 150, and Comins v. Supervisors, 3 Thomp. & C. 296, were suits brought to set aside or to restrain town or city bonding proceedings, unauthorized by law, by which a municipal debt would be created, and the burden of individual taxation would be increased. The courts held that no such suit could be maintained, either by tax-payers uniting, or by one or some suing on behalf of others, or by a single tax-payer suing by himself alone. But the reasons for this conclusion have no real connection with nor bearing upon the doctrine concerning the prevention of a multiplicity of suits. The ground upon which the judgment of the court was rested is the same that had been before announced in Doolittle v. Supervisors, 18 N. Y. 155, and Roosevelt v. Draper, 23 N. Y. 318, viz., that the individual tax-payer, under these circumstances, has *no* cause of action, legal or equitable,— has no remedial right acknowledged by a court of justice. If he has no right or remedy individually, he does not obtain any by joining himself with other tax-payers in the same situation, as co-plaintiffs. This theory does not and cannot affect the doctrine as to multiplicity of suits. The jurisdiction to prevent a multiplicity of suits never be some difference among individual equity judges in regard to the extent to which they would compel a complainant to establish his legal title, and to prosecute or suffer repeated actions at law, before they would interfere on his behalf;

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confers upon a party a remedial right where none of any kind existed before; its exercise necessarily and always assumes that the parties had *some* prior existing cause of action or remedial right, either equitable or more commonly legal. In Barnes v. Beloit, 19 Wis. 93, and Newcomb v. Horton, 18 Wis. 566, 568, it was held that a number of separate lot-owners or tax-payers cannot unite, and one cannot sue on behalf of himself and others, to restrain the enforcement of an invalid tax or assessment, since there is no sufficient common interest among them; but one lot-owner or tax-payer is permitted in Wisconsin to bring such an action for himself alone. In the case of Cutting v. Gilbert, 5 Blatch. 259, 261–263, six firms of bankers united in the bill on behalf of themselves and others, etc., to restrain United States revenue officers from assessing and collecting a certain United States tax. Nelson, J., was of the opinion that the plaintiffs were not liable for the tax, but held that the bill could not be sustained, since the remedy by action at law was adequate. He stated his view of the doctrine in the following clear and unmistakable language: "The interest that will allow parties to join in a bill, or that will allow the court to dispense with the presence of all the parties, when numerous, except a determinate number, is not only an interest *in the question*, but one *in common in the subject-matter of the suit;* such as the case of disputes between the lord of a manor and his tenants, or between the tenants of one manor and those of another; or where several tenants of a manor claim the profits of a fair; or in a suit to settle a general fine to be paid by all the copyhold tenants of a manor, or in order to prevent a multiplicity of suits. In all these and the like instances given in the books, there is a community of interest growing out of the nature and condition of the right in dispute: for although there may not be any privity between the numerous parties, there is a common title out of which the question arises, and which lies at the foundation of the proceedings. . . . In the case before me the only matter in common among the plaintiffs, or between them and the defendant, is an interest in the question [of law] involved, which alone cannot lay a foundation for the joinder of parties." He goes on to show that an injunction at the suit of a single tax-payer would not, as a matter of fact, prevent a multiplicity of actions. There is no room here for misunderstanding. Is the learned judge correct, upon the authorities, in the test which he lays down? Undoubtedly, in many of the decided cases, there is something more than a community of interest in the *question* at issue, or in the remedy demanded; there is a community of interest in the subject-matter, in the right, or, to use the expressive language of Mr. Justice Nelson, "a common title out of which the question arises." As, for example, where all the tenants of a manor assert a right of common of some kind arising from the customs of the manor; or where the lord asserts some claim of rent against all the tenants arising in the same manner; or where all the parishioners assert a *modus* against the parson; and other like instances. But there certainly are many cases, relating to various kinds of subject-matter, in which but this difference, if it exists, only affects the application of a well-settled rule, and not the rule itself. In cases belonging to the third and fourth classes, when a body of persons assert some claim against a single distinct party, or conversely a single distinct party asserts some claim against a body of persons, the fundamental question, upon which the exercise of the jurisdiction confessedly rests, and over

there is no common title, no community of interest in the subject-matter or in the right, but only a community of interest in the question at issue or in the remedy demanded. In most of them this community among the numerous body of interest in the question and in the remedy arises from the fact that one wrongful act or one legal injury was done to all alike; but still the legal right of each is wholly separate and distinct. The group of cases where separate owners have united to obtain relief against a single nuisance, or trespass, or evasion of water privileges, etc., are examples. The many cases in which separate lot-owners have been relieved from an illegal assessment imposing a lien upon their individual lands are also examples. But even this bond of union has not always been present, nor always been required. The mere community of interest in the question at issue and in the relief to be obtained has been held sufficient, although the wrongful act done, the injury inflicted, was separate and distinct to each individual of the numerous body of claimants. The celebrated case growing out of Schuyler's fraud in making unlawful overissues of stock to different persons at different times, as described under a former paragraph (see *ante,* § 261), is a striking illustration of the power of courts to disregard mere formal restrictions for the purpose of doing substantial justice. I would remark, in passing, that the court which sustained this Schuyler case as a proper exercise of the equitable jurisdiction to prevent a multiplicity of suits cannot with much consistency refuse to relieve a body of tax-payers or separate lot-owners from an illegal tax or assessment, on the ground that there is not a sufficient community of interest among them. The conclusion from the foregoing examination seems to be irresistible, that the test suggested by Mr. Justice Nelson in the well-known case of Cutting v. Gilbert, 5 Blatch. 259, is not supported by authority or by principle. In Phelps v. City of Watertown, 61 Barb. 121, 123, a suit by a single citizen and tax-payer to restrain the city officials from making unauthorized and unlawful contracts which would create a public debt and result in additional taxes and assessments, was held not to be within the equitable jurisdiction of preventing a multiplicity of suits. Johnson, J., said (p. 123): "Nor is there any ground to apprehend that the plaintiff will become involved in a multiplicity of actions by the acts complained of, *unless he seeks them voluntarily.*" So far as this passage has any meaning as an argument, it implies that the jurisdiction to prevent a multiplicity of suits will never be exercised on behalf of a plaintiff, when he himself would otherwise be obliged voluntarily — that is, of his own option or choice — to bring numerous actions in order to obtain justice,— a position which is directly opposed to the universally admitted and familiar rules, since the most important branch of the jurisdiction applies to parties in exactly that situation.

which there has been a direct antagonism of judicial opinion, relates to the nature, extent, and object of the common interest which must exist among the individual members of the numerous body, and between them and their single adversary, in order that a court of equity may interfere. Incidental to this main element, the further question has been raised, What party is entitled to relief for the purpose of preventing a multiplicity of suits?—whether the plaintiff who invokes the aid of a court upon that ground must himself be the person who would otherwise, and against his own choice, be exposed to a repeated and vexatious litigation?[a]

(a) **Cases of the "Third Class" Denying the Jurisdiction.**— See Baker v. Portland, 5 Saw. 566, Fed. Cas. No. 777 (no "privity of interest" among the complainants); Scottish Union, etc., Ins. Co. v. J. H. Mohlman Co., 73 Fed. 66; Thomas v. Council Bluffs Canning Co., 92 Fed. 422, 34 C. C. A. 428; Washington Co. v. Williams, 111 Fed. 801, 49 C. C. A. 621; Turner v. City of Mobile, 135 Ala. 73, 33 South. 133, 147, and the tax cases cited in the notes to §§ 265, 266. But several of these cases may be distinguished, for the reason that the exercise of the jurisdiction was unnecessary or would be ineffectual, under the principles of §§ 251½, 251¾, *ante*. Scottish Union, etc., Ins. Co. v. J. H. Mohlman Co., *supra*, was a bill by several insurance companies against the same insured to enjoin actual or prospective suits at law growing out of the same loss, to each of which the complainants had the same defense. Lacombe, Cir. J., cited no authorities in support of his denial of the jurisdiction, but was of the opinion that the plaintiff in the suits at law, if unsuccessful in one or two suits, would not prosecute the other. For bills sustained under circumstances precisely similar, see *ante*, § 261, note (b), near beginning of the note. Thomas v. Council Bluffs Canning Co. was a bill by numerous complainants for specific performance of contracts for the sale of their shares of stock. The relief sought was in substance pecuniary, and the court intimated that the complainants might avoid a multiplicity of legal actions equally as well by assigning their claims to one of their number. Washington County v. Williams was a suit by numerous holders of an issue of county bonds, payable from the proceeds of a special tax, to establish the validity of the bonds and recover the amount due thereon. Caldwell and Thayer, Cir. JJ. (Sanborn, Cir. J., dissenting), denied that the jurisdiction of equity existed in such a case on the ground of avoiding a multiplicity of suits; but also pointed out that a court of equity was powerless to grant complete relief in the premises, since it could not command the levy of a tax, and hence the complainants, even if successful in equity, would be compelled to resort to their legal remedies by mandamus in order to enforce the decree. The opinion of McClellan, C. J., in Turner v. City of Mobile contains a vigorous denial of the jurisdiction in case of class third where there is no "privity" among

We have also seen, in a certain class of cases growing out of some unauthorized public official act, the principle has been announced that, under the circumstances, the injured persons, citizens, or inhabitants of a local district had no cause of action of any kind, no claim to any relief from a court of justice. This principle, which may be correct, is avowedly based alone upon considerations of governmental policy and public expediency, and has therefore no legitimate connection with the doctrine concerning the prevention of a multiplicity of suits. The principle has, however, in some subsequent decisions, been regarded and acted upon, very improperly in my opinion, as though it directly applied to, interfered with, abridged, or regulated the equitable jurisdiction to prevent a multiplicity of suits. The error

the plaintiffs. The learned chief justice clearly points out, however, as we have seen above, *ante*, note (e) to § 251½, that the *decision* in the case is not necessarily at variance with any principle contended for by the author, and in making the question of jurisdiction depend on the question of "privity," ignores the early decision of his court in Morgan v. Morgan, 3 Stew. (Ala.) 383, 21 Am. Dec. 638, where any distinction, based on "privity," in bills of peace, is expressly repudiated.

Cases which deny the jurisdiction in "class third" appear to be relatively more numerous than those that deny the jurisdiction in "class fourth." In support of such denial of the jurisdiction in the former class the courts, so far as the editor has noticed, content themselves, in the main, with the dogmatic assertion that "the jurisdiction to prevent a multiplicity of suits cannot properly be invoked except by the person who may be subjected to them;" or that the numerous plaintiffs "cannot individually complain that others are compelled to sue, for they have no share in the expense or vexation of each other's suits." A convincing answer to this objection may be found in the two considerations clearly set forth in Smith v. Bank of New England, 69 N. H. 254, 45 Atl. 1082, by Carpenter, C. J.: "For the determination of one issue the public must provide seventy-nine sessions of the court and seventy-nine juries. In short, a single issue, upon which the rights of all parties interested in the controversy depend, must be tried seventy-nine times, and the parties and the public be subjected to the worse than useless expense of seventy-eight trials. . . . A speedy and inexpensive adjudication of their common right is quite as important to the numerous plaintiffs as to the single defendant, and it may be much more so. Cases may often happen where a rejection of their application for equitable intervention to prevent a multiplicity of suits would operate practically as a denial of justice. Suppose, *e. g.*, that each of one hundred persons held an interest coupon for $6, on bonds issued by a town or other corporation, and that the only controverted question was as to the validity of the bonds. Each coupon-involved in the mingling of two entirely distinct matters has, I think, been shown with sufficient clearness in a previous note.

§ 268. **Conclusions as to the Third and Fourth Classes.**[a]— From a careful comparison of the actual decisions embraced in the third and fourth classes, and which are quoted under the foregoing paragraphs, the following propositions are submitted as established by principle and by authority, and as constituting settled rules concerning this branch of the equitable jurisdiction. In that particular family of suits, whether brought on behalf of a numerous body against a single party, or by a single party against a numerous body, which are strictly and technically "bills of peace," in order that a court of equity may grant the relief and thus exercise its jurisdiction on the ground of preventing a multiplicity of suits, there does and must exist among the individuals composing the numerous body,

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holder would have a clear and, in a legal sense, an adequate remedy at law. But if he recovered in an action at law, he would realize nothing, as the necessary expenses of the suit would exceed the amount recovered. If, on the other hand, the question were determined in one suit, each might realize substantially the amount of his demand. To hold that equity will intervene in behalf of the corporation, but not in behalf of the coupon-holders, to compel the issue to be tried in one suit, would bring deserved reproach upon the administration of justice."

Indeed, the conjecture may be hazarded that the denial of the jurisdiction may frequently effect a greater practical injustice in cases of "class third" than in most cases of class fourth. In a typical case of class fourth, where the single party is assailed by numerous suits involving the same issues, a determination of one or a few of these in his favor will generally, perhaps, result in the abandonment of the others, even without the interposition of equity; while in very many cases of class third, the burden of a single great wrong is made to fall upon a large number of individuals, few of whom can, unaided, afford the expense of litigation, and thus practical immunity is secured for the wrong-doer. See the forcible observations of Walker, J., in Greedup v. Franklin County, 30 Ark. 101, quoted *ante*, note (d) to § 260.

(a) This section is cited in Washington County v. Williams, 111 Fed. 801, 815, 49 C. C. A. 621, dissenting opinion of Sanborn, Cir. J.; in Barton Nat. Bank v. Atkins, 72 Vt. 33, 47 Atl. 176; Osborne v. Wisconsin Cent. R. Co., 43 Fed. 824, by Harlan, J., cases illustrating the "third class;" in City of Albert Lea v. Nielsen, 83 Minn. 246, 86 N. W. 83, a case of the "fourth class."

or between each of them and their single adversary, a common *right*, a community of interest in the *subject-matter of the controversy*, or a common *title* from which all their separate claims and all the questions at issue arise; it is not enough that the *claims* of each individual being separate and distinct, there is a community of interest merely in the *question of law or of fact* involved, or in the *kind and form of remedy* demanded and obtained by or against each individual.[b] The instances of controversies between the lord of a manor and his tenants concerning some general right claimed by or against them all arising from the custom of the manor, or between a parson and his parishioners concerning tithes or a *modus* affecting all, and the like, are examples. It must be admitted, as a clear historical fact, that at an early period the court of chancery confined this branch of its jurisdiction to these technical "bills of peace." The above rule, as laid down in them, was for a considerable time the limit beyond which the court would not exercise its jurisdiction in cases belonging to the third and fourth classes. For this reason many passages and *dicta* found in the judicial opinions of that day must be regarded as merely expressing the restrictive theory which then prevailed in the court of chancery, and as necessarily modified by the great enlargement and extension of the jurisdiction which has since taken place; and at all events, these *dicta* and incidental utterances should, on any correct principle of interpretation, be treated as confined, and as intended to be confined, to the technical " bills of peace " in which they occurred, or concerning which they were spoken. Notwithstanding this general theory of the jurisdiction which prevailed at an early period, it is certain that even then the court sometimes transcended the arbitrary limit, and exercised the jurisdiction, where there was no pretense of any community of right, or title, or interest in the subject-matter.

(b) Quoted, Carlton v. Newman, 77 **Me. 408, 1 Atl. 194; Zahnhizer v.** Hefner, 47 W. Va. 48, 35 S. E. 4.

§ 269.[a] This early theory has, however, long been abandoned. The jurisdiction, based upon the prevention of a multiplicity of suits, has long been extended to other cases of the third and fourth classes, which are not technically "bills of peace," but "are analogous to" or "within the principle of" such bills. Under the greatest diversity of circumstances, and the greatest variety of claims arising from unauthorized public acts, private tortious acts, invasion of property rights, violation of contract obligations, and notwithstanding the positive denials by some American courts, the weight of authority is simply overwhelming that the jurisdiction may and should be exercised, either on behalf of a numerous body of separate claimants against a single party, or on behalf of a single party against such a numerous body, although there is no "common title," nor "community of right" or of "interest in the subject-matter," among these individuals, but where there is and because there is merely a community of interest among them in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body.[b] In a majority of the decided cases, this

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(a) This section is cited with approval in San Lung v. Jackson, 85 Fed. 502; Liverpool & L. & G. Ins. Co. v. Clunie, 88 Fed. 160, 167; Virginia-Carolina Chemical Co. v. Home Ins. Co., 113 Fed. 1, 5; Washington County v. Williams, 111 Fed. 801, 815, 49 C. C. A. 621, dissenting opinion of Sanborn, Cir. J.; Osborne v. Wisconsin Cent. R. Co., 43 Fed. 824, by Harlan, J.; Dumars v. City of Denver (Colo. App.), 65 Pac. 580; Macon, etc., R. Co. v. Gibson, 85 Ga. 1, 11 S. E. 442, 21 Am. St. Rep. 134; Indiana, I. & I. R. Co. v. Swannell, 157 Ill. 616. 41 N. E. 989, 30 L. R. A. 290, 297; Barton Nat. Bank v. Atkins, 72 Vt. 33, 47 Atl. 176; Carey v. Coffee-Stemming Mach. Co. (Va.), 20 S. E. 778; Bosher v. Richmond, etc., Land Co., 89 Va. 455, 16 S. E. 360, 37 Am. St. Rep. 879. All these are cases illustrating the author's "third class."

This section is cited with approval in De Forest v. Thompson, 40 Fed. 375; United States v. Southern Pac. R. Co., 117 Fed. 544, 554; Wyman v. Bowman, (C. C. A.), 127 Fed. 257, 264; Farmington Corp. v. Bank, 85 Me. 46, 52, 26 Atl. 965; Kellogg v. Chenango Valley Sav. Bank, 42 N. Y. Supp. 379, 11 App. Div. 458; cases of the fourth class.

(b) Quoted with approval, Carlton v. Newman, 77 Me. 408, 1 Atl. 194; Keese v. City of Denver, 10 Colo. 113, 15 Pac. 825; Smith v. Bank of New community of interest in the questions at issue and in the kind of relief sought has originated from the fact that the separate claims of all the individuals composing the body arose by means of the same unauthorized, unlawful, or illegal act or proceeding. Even this external feature of unity, however, has not always existed, and is not deemed essential. Courts of the highest standing and ability have repeatedly interfered and exercised this jurisdiction, where the individual claims were not only legally separate, but were separate in time, and each arose from an entirely separate and distinct transaction, simply because there was a community of interest among all the claimants in the question at issue and in the remedy.[c] The same overwhelming weight of authority effectually disposes of the rule laid down by some judges as a test, that equity will never exercise its jurisdiction to prevent a multiplicity of suits, unless the plaintiff, or each of the plaintiffs, is himself the person who would necessarily, and contrary to his own will, be exposed to numerous actions or vexatious litigation. This position is opposed to the whole course of decision in suits of the third and fourth classes from the earliest period down to the present time.[d] While the foregoing conclusions

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England, 69 N. H. 254, 45 Atl. 1082, cases of the "third class;" Corey v. Sherman, 96 Iowa, 114, 64 N. W. 828, 32 L. R. A. 490, 509, case of a single plaintiff suing in behalf of a numerous body; Louisville, N. A. & C. R. Co. v. Ohio V. I. & C. Co., 57 Fed. 42, 45; Smith v. Dobbins, 87 Ga. 303, 13 S. E. 496; Siever v. Union Pac. R. Co. (Nebr.), 93 N. W. 943, cases of the "fourth class;" Hale v. Allinson, 102 Fed. 790, 791, 792, distinguishing the "fourth class." "We are not disposed to deny that jurisdiction on the ground of preventing a multiplicity of suits may be exercised in many cases on behalf of a single complainant against a number of defendants, although there is no common title or community of rights or interest in the subject-matter among such defendants, but where there is a community of interest among them in the questions of law and fact involved in the general controversy." Hale v. Allinson, 188 U. S. 56, 23 Sup. Ct. 244, 252.

(c) Quoted with approval in Lockwood County v. Lawrence, 77 Me. 297, 309, 52 Am. Rep. 763, a case of the "third class;" Corey v. Sherman, 96 Iowa, 114, 64 N. W. 828, 32 L. R. A. 490, 509, case of a single plaintiff suing in behalf of a numerous body; Louisville, N. A. & C. R. R. Co. v. Ohio Val. I. & C. Co., 57 Fed. 42, 45, a case of the "fourth class."

(d) Quoted with approval in Carlton v. Newman, 77 Me. 408, 414, 1 Atl. 194, a case of the "third class."

are supported by the great weight of judicial authority, they are, in my opinion, no less clearly sustained by principle. The objection which has been urged against the propriety or even possibility of exercising the jurisdiction, either on behalf of or against a numerous body of separate claimants, where there is no " common title," or community " of right " or " of interest in the subject-matter," among them, is, that a single decree of the court cannot settle the rights of all; the legal position and claim of each being entirely distinct from that of all the others, a decision as to one or some could not in any manner bind and dispose of the rights and demands of the other persons, and thus the proceeding must necessarily fail to accomplish its only purpose,— the prevention of further litigation. This objection has been repeated as though it were conclusive; but like so much of the so-called " legal reasoning " traditional in the courts, it is a mere empty formula of words without any real meaning, because it has no foundation of fact,— it is simply untrue; one arbitrary rule is contrived and then insisted upon as the reason for another equally arbitrary rule.[e] The sole and sufficient answer to the objection is found in the actual facts. The jurisdiction *has* been exercised in a great variety of cases where the individual claimants were completely separate and distinct, and the only community of interest among them was in the question at issue and perhaps in the kind of relief, and the single decree *has* without any difficulty settled the entire controversy and determined the separate rights and obligations of each indi-

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(e) "It is true that there are occasional cases where it seems to have been supposed that there must be some community of interest,— some tie between the individuals who make up the great number; but the great weight of authority is to the contrary and there is a multitude of cases which either in terms deny the necessity of such a fact or ignore it by granting relief where the fact did not exist. And, indeed, it is difficult to find any reason why it should be thought necessary. *It has no relevancy to the principle or purpose of the doctrine itself*, which stands not merely as a makeweight when other equities are present, but as an independent and substantive ground of jurisdiction." Bailey v. Tillinghast, (C. C. A.), 99 Fed. 801, 807.

vidual claimant.[1] The same *principle* therefore embraces both the technical "bills of peace," in which there is confessedly a common right or title or community of interest in the subject-matter, and also those analogous cases over which the jurisdiction has been extended, in which there is no such common right or title or community of interest in the subject-matter, but only a community of interest in the question involved and in the kind of relief obtained.[f]

§ 270.[a] A few additional words may be proper with respect to the exercise of the jurisdiction on behalf of tax-payers and other members of a local district or community affected by an unlawful common or public burden. Whereever the principle has been finally settled that individual citizens or members of a municipality sustaining an injury from some unauthorized or illegal official act, in common with all the other citizens or members of the same district, — that is, only suffering the same wrong or loss which is inflicted upon all other like persons,— have no cause of action whatever, no remedial right recognized by any court of justice, there can, of course, be no exercise on their behalf of the equitable jurisdiction to prevent a multiplicity of suits. And if the principle is held to embrace tax-payers, they are also without any equitable relief. But it is a grave error to suppose that this doctrine has any special connection with the equitable jurisdiction to prevent a multiplicity of suits, or in any special manner restricts that jurisdiction. Being based upon high considerations of governmental policy, it avowedly overrides and displaces all judicial authority, every form of judicial action. Wherever, on the other hand, the tax-payers of a district subject to an unlawful burden are regarded as having some cause of action, as entitled to some judicial remedy,— as, for example, where the individual tax-payer may maintain an action at law to recover back the illegal tax which he has paid, or to recover damages,— there, in my opinion, all the reasons for exercising the jurisdiction to prevent a multiplicity of suits in any case of the third or fourth classes apply with great and convincing force in support of the same jurisdiction in behalf of such tax-payers. Notwithstanding the adverse decisions, the weight of judicial authority in favor of this conclusion, and of exercising the jurisdiction under every form of local assessment, general tax, municipal debt, or other public burden by which taxation would be increased, is very decided.[1] On principle, no distinction can be discovered between the case of such tax-payers, and the instances in which the jurisdiction has been repeatedly exercised and fully established on behalf of a common body of separate claimants. Each tax-payer has a remedy by action at law; but it is to the last degree inadequate and imperfect, and often nominal, since he must wait until the wrong has been accomplished against himself before he can obtain redress; and at best, the rights of all can only be secured even in this incomplete manner by an indefinite number of litigations. By means of the equitable jurisdiction, the whole controversy and the rights of every individual tax-payer can be finally determined in one judicial proceeding by one judicial decree. This is not a plausible theory; it is a fact demonstrated in the constant judicial experience of numerous states.[2]

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[1] While this result has been accomplished in the Schuyler fraud case, 17 N. Y. 592, in the water company case, L. R. 2 Ch. 8, in the case of the complicated contract, 7 N. J. Eq. 440, and in other like instances where the separate demands of the claimants had no common origin, but each arose from a distinct transaction, and in the various tax-payers' cases, it is plain that the objection under consideration is merely illusory; that it is truly what I have called it, an empty formula of words without any real meaning. Much of this *a priori* reasoning explaining why a particular thing could not be done, repeated by judge after judge, has in like manner been exploded simply by doing the thing which had, through verbal logic, been shown to be impossible. This one fact is the essence of a great deal of the modern legal reform.

(f) This passage of the text is quoted with approval in Siever v. Union Pac. R. R. Co. (Nebr.), 93 N. W. 943.

(a) This section is cited in Allen v. Intendant, etc., of La Fayette, 89 Ala. 641, 8 South. 30.

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[1] This weight of authority becomes even more imposing from the fact that in New York, and in several other states whose courts have followed the lead of New York tribunals, the denial of relief to the tax-payers has been based, in part at least, upon the principle of public policy mentioned above in the text, by virtue of which individual tax-payers were held to be without any remedial right. The adoption of this principle at once ended all possibility of judicial interference; and these decisions have therefore no legitimate authority upon the question as to the equitable jurisdiction to prevent a multiplicity of suits being exercised on behalf of tax-payers.

§ 271. **Cases in Which the Jurisdiction is Exercised — First Class.**[a]— Having thus examined the meaning, extent, and operation of the doctrine, I shall enumerate, without any further description, the various kinds of cases in which the jurisdiction to prevent a multiplicity of suits has been exercised, and over which it has been settled by a preponderance of judicial authority. *Class first.*— The jurisdiction is constantly exercised, under a proper condition of facts, in the following instances belonging to the first class: Suits by a proprietor to restrain continuous trespasses;[1] [b]

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[2] Can it appear to the thoughtful observer otherwise than as a farce or travesty upon the administration of *justice*, to see a court deny all relief to a body of tax-payers suing in the form of an equitable *action* to restrain an illegal tax, or to set aside an illegal official act, such as a town bonding, for the alleged reasons that their interests were separate, and could not be determined by one decree, and then to see the self-same judges, on behalf of the same tax-payers in the same case, and upon exactly the same facts set forth in a petition, grant the very identical relief, and set aside the tax or official act, by their adjudication made upon a writ of certiorari?[b] We may still hope that the time will come, in the progress of an enlightened legal reform, when the administration of justice will be *based* entirely upon considerations of substance, and not of mere form. The reformed system of procedure as it is administered by some courts has left much room for further improvement in the modes of obtaining *justice.*

[1] Hanson v. Gardiner, 7 Ves. 305, 309, 310; Livingston v. Livingston, 6 Johns. Ch. 497, 500, 10 Am. Dec. 353; Hacker v. Barton, 84 Ill. 313.

§ 270, (b) Quoted in Equitable Guarantee & T. Co. v. Donahoe (Del.), 45 Atl. 583.

§ 271, (a) This section is cited in Preteca v. Maxwell Land Grant Co., (C. C. A.), 50 Fed. 674.

§ 271, (b) See *ante*, § 252; Carney v. Hadley, 32 Fla. 344, 14 South. 4, 37 Am. St. Rep. 101, 22 L. R. A. 233; Nichols v. Jones, 19 Fed. 855; Boston & M. R. R. Co. v. Sullivan, 177 Mass. 230, 83 Am. St. Rep. 275, 58 N. E. 689; Davis v. Frankenlust Tp., 118 Mich. 494, 76 N. W. 1045; Warren Mills v. N. O. Seed Co., 65 Miss. 391, 7 Am. St. Rep. 671, 4 South. 298; Birmingham Traction Co. v. S. B. T. & T. Co., 119 Ala. 144, 24 South.

to restrain and remove private nuisances, especially when they are infringements upon some easement, as a water right;[2][c] to restrain waste;[3] and to settle disputed boundaries.[4] The jurisdiction has also been admitted, under special circumstances, to settle the entire controversy between two parties growing out of some complicated contract involving numerous questions and many actions at law.[5][d]

§ 272. **Second Class.**— In cases belonging to the first branch of this class, the rule is familiar that the court will interfere to restrain actions of ejectment to recover the same tract of land when the plaintiff's title has already been sufficiently established at law;[1][a] and to restrain further or successive actions, not of ejectment, brought for the same matter, when the plaintiff's rights have already been fully established in some prior judicial proceeding between the same parties.[2][b] In cases constituting the second branch of this class, the court *may* restrain numerous simultaneous actions against the plaintiff brought by the same defendant, all involving the same questions, for the purpose of having the whole decided by one trial and decree. The court will not interfere, however, when, by the rules of legal procedure, all the actions can be consolidated by order of the court of law.[3][c]

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[2] Parker v. Winnipiseogee, etc., Co., 2 Black, 545, 551; Carlisle v. Cooper, 21 N. J. Eq. 576, 579; Corning v. Troy Iron Factory, 39 Barb. 311, 327, 34 Barb. 485, 492; Webb v. Portland Mfg. Co., 3 Sum. 189; Lyon v. McLaughlin, 32 Vt. 423, 425, 426; Sheetz's Appeal, 35 Pa. St. 88, 95; Holsman v. Boiling Spring Co., 14 N. J. Eq. 335; Sheldon v. Rockwell, 9 Wis. 166, 179, 76 Am. Dec. 265; Eastman v. Amoskeag, etc., Co., 47 N. H. 71, 79, 80; and restraining an interference with plaintiff's exclusive ferry franchise: McRoberts v. Washburne, 10 Minn. 23, 30; Letton v. Goodden, L. R. 2 Eq. 123, 130. Also, such nuisance is restrained at the suit of numerous separate proprietors, where each is injured by it in his own land: Cardigan v. Brown, 120 Mass. 493, 495; Ballou v. Inhabitants of Hopkinton, 4 Gray, 324, 328; Murray v. Hay, 1 Barb. Ch. 59, 43 Am. Dec. 773; Reid v. Gifford, Hopk. Ch. 416, 419, 420.

[3] Hughlett v. Harris, 1 Del. Ch. 349, 352, 12 Am. Dec. 104.

[4] Hill v. Proctor, 10 W. Va. 59, 77.

[5] Biddle v. Ramsey, 52 Mo. 153, 159; Black v. Shreeve, 7 N. J. Eq. 440, 456, 457; for limitations upon the jurisdiction in such cases, see Richmond v. Dubuque, etc., R. R., 33 Iowa, 422, 487, 488, per Beck, C. J.

[1] Earl of Bath v. Sherwin, Prec. Ch. 261, 10 Mod. 1, 1 Brown Parl. C. 266, 270, 2 Brown Parl. C., Tomlins's ed., 217; Leighton v. Leighton, 1 P. Wms.

731; Golden v. Health Dept., 47 N. Y. Supp. 623, 21 App. Div. 420; Hall v. Sugo, 61 N. Y. Supp. 770, 46 App. Div. 632; Olivella v. New York & H. R. Co., 64 N. Y. Supp. 1086, 31 Misc. Rep. 203; Gibbs v. McFadden, 39 Iowa, 371; Ten Eyck v. Sjoburg, 68 Iowa, 625, 27 N. W. 785. For additional cases, consult Pom. Eq. Rem., "Injunction against Trespass."

(c) See *ante*, § 252; Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567, where the nuisance consisted of a brick kiln; Coatsworth v. Lehigh Val. R. Co., 156 N. Y. 451, 51 N. E. 301, affirming 48 N. Y. Supp. 511, 24 App. Div. 273; and Pom. Eq. Rem., "Injunction against Nuisance."

(d) *Ante*, §§ 252, 263, and notes. See also Stovall v. McCutcheon, 107 Ky. 577, 92 Am. St. Rep. 373, 54 S. W. 969, 47 L. R. A. 287; Shimer v. Morris Canal & B. Co., 27 N. J. Eq. 364; Peterson v. Fleming, 63 Ill. App. 357.

(a) *Ante*, §§ 248, 253; Holland v. Challen, 110 U. S. 15, 19, 3 Sup. Ct. 495; Sharon v. Tucker, 144 U. S. 542,

§ 273. **Third Class.**[a]— The cases constituting this class must be separated into several different groups, all depend-

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671; Devonsher v. Newenham, 2 Schoales & L. 208, 209; Weller v. Smeaton, 1 Cox, 102, 1 Brown Ch. 573; Earl of Darlington v. Bowes, 1 Eden, 270, 271; Alexander v. Pendleton, 8 Cranch, 462, 468; Trustees of Huntington v. Nicoll, 3 Johns. 566, 589, 590, 591, 595, 601, 602; Eldridge v. Hill, 2 Johns. Ch. 281; Woods v. Monroe, 17 Mich. 238; Bond v. Little, 10 Ga. 395, 400; Harmer v. Gwynne, 5 McLean, 313, 315; Patterson v. McCamant, 28 Mo. 210; Knowles v. Inches, 12 Cal. 212.

[2] Paterson, etc., R. R. v. Jersey City, 9 N. J. Eq. 434.

[3] Kensington v. White, 3 Price, 164, 167; Third Ave. R. R. Co. v. Mayor, etc., of New York, 54 N. Y. 159, 162, 163. But see, *per contra*, West v. Mayor, etc., of New York, 10 Paige, 539.

12 Sup. Ct. 720; Dishong v. Finkbiner, 46 Fed. 12, 16; Pratt v. Kendig, 128 Ill. 293, 21 N. E. 495.

(b) *Ante*, § 253; Bank of Kentucky v. Stone, 88 Fed. 383; Union & Planters' Bank v. Memphis, 111 Fed. 561, 49 C. C. A. 455; Siever v. Union Pac. R. Co. (Nebr.), 93 N. W. 943.

(c) *Ante*, § 254, and notes. See Cuthbert v. Chauvet, 60 Hun, 577, 14 N. Y. Supp. 385, 20 Civ. Proc. Rep. 391; Norfolk & N. B. Hosiery Co. v. Arnold, 143 N. Y. 265, 38 N. E. 271; Galveston, H. & S. A. R'y Co. v. Dowe, 70 Tex. 5, 7 S. W. 368; Featherstone v. Carr, 132 N. C. 800, 44 S. E. 592; City of Hutchinson v. Beckham, (C. C. A.) 118 Fed. 399; Sylvester County v. St. Louis, 130 Mo. 323, 51 Am. St. Rep. 566, 32 S. W. 649; Davis v. Fasig, 128 Ind. 271, 27 N. E. 726; City of Rushville v. Rushville Natural Gas Co., 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321; Joseph Schlitz Brewing Co. v. City of Superior, 117 Wis. 297, 93 N. W. 1120; Milwaukee El. R. & L. Co. v. Bradley, 108 Wis. 467, 84 N. W. 870. *Per contra*, see Poyer v. Village of Des Plaines, 123 Ill. 111, 13 N. E. 819, 5 Am. St. Rep. 494; Chicago, B. & Q. R. R. Co. v. City of Ottawa, 148 Ill. 397, 36 N. E. 85; Yates v. Village of Batavia, 79 Ill. 500; Cleland v. Campbell, 78 Ill. App. 624; Ewing v. City of Webster City, 103 Iowa, 226, 72 N. W. 511.

(a) This section is quoted in full in Turner v. City of Mobile, 135 Ala. 73, 33 South. 133, 142; and cited ing, however, upon the same principle. The jurisdiction is exercised in suits brought by numerous persons to establish their separate claims against a single party, where these claims, although separate, all arise from a common title, and there is a common right or common interest in the subject-matter;[1] [b] in suits by numerous individual proprietors of separate tracts of land to restrain and abate a private nuisance or continuous trespass which injuriously affects each proprietor;[2] [c] in suits by numerous separate judgment creditors to reach the property of and enforce their judgments against the same fraudulent debtor;[3] [d] in suits by numerous owners of separate and distinct lots of land to set aside or restrain the collection of an illegal assessment for local improvements laid by a city, town, or other municipal corporation, and made a lien on their respective lots;[4] [e] and in suits by numerous tax-payers of a town, city, county, or other district to restrain or set aside an illegal general tax, whether personal or made a lien upon their respective property, or an illegal proceeding of the local officials whereby a public debt would be created and taxation would be increased.[5] [f]

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[1] Technically called "bills of peace"; e. g., suits by tenants against the lord of the manor; by parishioners against the parson, etc.: Cowper v. Clerk, 3 P. Wms. 155, 157; Weale v. West Middlesex Water Co., 1 Jacobs & W. 358, 369, per Lord Eldon; Phillips v. Hudson, L. R. 2 Ch. 243, 246; Powell v. Powis, 1 Younge & J. 159; Rudge v. Hopkins, 2 Eq. Cas. Abr. 120, pl. 27; Conyers v. Abergavenny, 1 Atk. 284.

[2] Cardigan v. Brown, 120 Mass. 493, 495; Ballou v. Inhabitants of Hopkinton, 4 Gray, 324, 328; Murray v. Hay, 1 Barb. Ch. 59, 43 Am. Dec. 773; Reid v. Gifford, Hopk. Ch. 416, 419, 420. But see, *per contra*, Marselis v. Morris Canal Co., 1 N. J. Eq. 31.

[3] Brinkerhoff v. Brown, 6 Johns. Ch. 139, 151, 156.

with approval in Washington County v. Williams, 111 Fed. 801, 815, 49 C. C. A. 621, dissenting opinion of Sanborn, Cir. J.; Osborne v. Wisconsin Cent. R. Co., 43 Fed. 824, by Harlan, J.; Allen v. Intendant, etc., of La Fayette, 89 Ala. 641, 8 South. 30, 9 L. R. A. 497; Dumars v. City of Denver (Colo. App.), 65 Pac. 580.

(b) See *ante*, §§ 247, 256, and notes.

(c) See *ante*, § 257, and notes, and the following among many other cases: Lonsdale Co. v. Woonsocket, 21 R. I. 498, 44 Atl. 929; Strobel v. Kerr Salt Co., 164 N. Y. 303, 79 Am. St. Rep. 643, 51 L. R. A. 687, 58 N. E. 142; Geurkink v. Petaluma, 112 Cal. 306, 44 Pac. 570; Younkin v. Milwaukee, etc., Co., 112 Wis. 15, 87 N. W. 861; First Nat. Bank v. Sarlls, 129 Ind. 201, 28 Am. St. Rep. 185, 28 N. E. 434; Whipple v. Guile, 22 R. I. 576, 84 Am. St. Rep. 855, 48 Atl. 935, and cases cited; Rowbotham v. Jones, 47 N. J. Eq. 337, 20 Atl. 731, and cases cited; Smith v. Smith, 148 Mass. 1, 18 N. E. 595, 2 Ames Cas. Eq. Jur. 64.

(d) See *ante*, § 261, notes 1, and (b), Class Third, (II); Enright v. Grant, 5 Utah, 334, 15 Pac. 268; Sheldon v. Packet Co., 8 Fed. 769.

§ 274. **Fourth Class.**[a]— The jurisdiction has been exercised in the following cases belonging to this class, and in most, if not all, of them it may be regarded as fully settled: In suits by a single plaintiff to establish a common right against a numerous body of persons, where the opposing claims of these individuals have some community of interest, or arise from some common title;[1] [b] in suits by a single plaintiff to establish a common right against a numerous body, where there is only a community of interest in the questions at issue among these opposing claimants, but none in the subject-matter or title;[2] [c] in suits by a single plaintiff against a numerous body of persons to establish his own right and defeat all their opposing claims, where the claims of these persons are legally separate, arose at different times and from separate sources, and are common only with respect to their interest in the question involved and in the kind of relief to be obtained by or against each;[3] [d] in suits by a single plaintiff against numerous defendants, parties to a complicated contract, where his rights against each are similar and legal, but would require, for their determination, a number of simultaneous or successive actions at law;[4] in suits by a single party against a number of persons to restrain the prosecution of simultaneous actions at law brought against him by each defendant, and to procure a decision of the whole in one proceeding, where all these actions depend upon the same questions of law and fact.[5] [e]

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[4] Ireland v. City of Rochester, 51 Barb. 415, 435; Scofield v. City of Lansing, 17 Mich. 437; City of Lafayette v. Fowler, 34 Ind. 140; Kennedy v. City of Troy, 14 Hun, 308, 312; Clark v. Village of Dunkirk, 12 Hun, 181, 187; but see, *per contra*, Dodd v. Hartford, 25 Conn. 232, 238; Howell v. City of Buffalo, 2 Abb. App. 412, 416; Bouton v. City of Brooklyn, 15 Barb. 375, 387, 392–394.

[5] Attorney-General v. Heelis, 2 Sim. & S. 67, 76; for a collection of American cases, see *ante*, note under § 260. For cases holding the contrary, see *ante*, note under § 266.

(e) See *ante*, § 260, notes, and § 266, notes; Keese v. City of Denver, 10 Colo. 113, 15 Pac. 825; Dumars v. City of Denver, (Colo. App.), 65 Pac. 580; Michael v. City of St. Louis, 112 Mo. 610, 20 S. W. 666.

(f) See also Greedup v. Franklin County, 30 Ark. 101; Bode v. New England Inv. Co., 6 Dak. 499, 42 N. W. 658, 45 N. W. 197; Knopf v. First Nat. Bank, 173 Ill. 331, 50 N. E. 660; City of Chicago v. Collins, 175 Ill. 445, 51 N. E. 907, 67 Am. St. Rep. 224, 49 L. R. A. 408; German Alliance Assur. Co. v. Van Cleave, 191 Ill. 410, 61 N. E. 94; Carlton v. Newman, 77 Me. 408, 1 Atl. 194; Clee v. Sanders, 74 Mich. 692, 42 N. W. 154; Ramsey v. Bader, 67 Mo. 476; Sherman v. Banford, 10 R. I. 559; McTwiggan v. Hunter, 18 R. I. 776, 30 Atl. 962, 2 Ames Cas. Eq. Jur. 71; Quimby v. Wood, 19 R. I. 571, 35 Atl. 149; McClung v. Livesay, 7 W. Va. 329; Doonan v. Board of Education, 9 W. Va. 246; Corrothers v. Board of Education, 16 W. Va. 527; Williams v. County Court, 26 W. Va. 488, 53 Am. Rep. 94 (an exhaustive review of the authorities); Blue Jacket v. Scherr, 50 W. Va. 533, 40 S. E. 514.

The author's enumeration of "groups" of cases of class third was plainly not intended to be exhaustive, as seems to have been supposed in Turner v. City of Mobile, 135 Ala. 73, 33 South. 133, 142, by McClellan, C. J. For numerous other illustrations of this class, see § 261, note; cases denying the jurisdiction in class third, see § 267, note; cases where the exercise of the jurisdiction would be ineffectual, § 251½, and notes.

(a) This section is cited in Nashville, C. & St. L. R. Co. v. M'Connell, 82 Fed. 65, 75; in Smith v. Dobbins, 87 Ga. 303, 13 S. E. 496; in Kellogg v. Chenango Valley Sav. Bank, 42 N. Y. Supp. 379, 11 App. Div. 458; Jones v. Hardy, 127 Ala. 221, 28 South. 564.

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[1] Technical "bills of peace": Lord Tenham v. Herbert, 2 Atk. 483; How v. Tenants of Bromsgrove, 1 Vern. 22; Ewelme Hospital v. Andover, 1 Vern. 266 (profits of a fair); Corp'n of Carlisle v. Wilson, 13 Ves. 276, 279 (tolls); New River Co. v. Graves, 2 Vern. 431; Brown v. Vermuden, 1 Chan. Cas. 272 (tithes); Rudge v. Hopkins, 2 Eq. Cas. Abr. 170, pl. 27 (tithes); Pawlet v. Ingres, 1 Vern. 308 (lord and tenants); Weeks v. Staker, 2 Vern. 301 (ditto); Arthington v. Fawkes, 2 Vern. 356 (ditto); Conyers v. Abergavenny, 1 Atk. 284 (ditto); Poor v. Clarke, 2 Atk. 515 (ditto); Duke of Norfolk v. Myers, 4 Madd. 83 (lord of manor,— tolls of a mill); Bouverie v. Prentice, 1 Brown Ch. 200.

[2] Mayor of York v. Pilkington, 1 Atk. 282; City of London v. Perkins, 3 Brown Parl. C., Tomlins's ed., 602, 4 Brown Parl. C., Tomlins's ed., 157; *per contra*, Dilley v. Doig, 2 Ves. 486 (no jurisdiction in suit by owner of a patent right or copyright against separate infringers).

[3] New York & N. H. R. R. v. Schuyler, 17 N. Y. 592, 599, 600, 605-608, 34 N. Y. 30, 44-46; Sheffield Water Works v. Yeomans, L. R. 2 Ch. 8, 11; Ware v. Horwood, 14 Ves. 28, 32, 33; Board, etc. v. Deyoe, 77 N. Y. 219.

(b) See *ante*, §§ 247, 256, and notes; Dodge v. Briggs, 27 Fed. 160.

(c) See *ante*, §§ 256, 261, and cases cited; Central Pac. R. R. Co. v. Dyer, 1 Saw. 641, Fed. Cas. No. 2,552; Hyman v. Wheeler, 33 Fed. 630; De Forest v. Thompson, 40 Fed. 375; Preteca v. Maxwell Land Grant Co., (C. C. A), 50 Fed. 674; Lasher v. McCreery, 66 Fed. 834, 843; Beatty v. Dixon, 56 Cal. 622; Guess v. Stone Mountain I. & R. Co., 67 Ga. 215; South Carolina R. Co. v. Steiner, 44 Ga. 546; City of Albert Lea v. Nielsen, 83 Minn. 246, 86 N. W. 83; Bishop v. Rosenbaum, 58 Miss. 84; Pollock v. Okolona Sav. Inst., 61 Miss. 293; Lowenstein v. Abramsohn, 76 Miss. 890, 25 South. 498; Waddingham v. Robledo, 6 N. M. 347, 28 Pac. 663; Vann v. Hargett, 22 N. C. (2 Dev. & B. Eq.) 31, 32 Am. Dec. 689 (an important case); Stockwell v. Fitzgerald, 70 Vt. 468, 44 Atl. 504; Ellis v. Northern Pac. R. R. Co., 77 Wis. 114, 45 N. W. 811.

(d) Quoted with approval, Northern Pac. R. R. Co. v. Walker, 47 Fed.

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[4] Black v. Shreeve, 7 N. J. Eq. 440, 456, 457.

[5] McHenry v. Hazard, 45 N. Y. 580, 587, 588; Board, etc. v. Deyoe, 77 N. Y. 219. See, *per contra*, County of Lapeer v. Hart, Harr. (Mich.) 157.

681, by Caldwell, J.; Hale v. Allinson, 102 Fed. 790, 792. See also McLean v. Lafayette Bank, 3 McL. 415, 419, Fed. Cas. No. 8,886; Woodruff v. North Bloomfield G. M. Co., 8 Saw. 628, 16 Fed. 25; Chase v. Cannon, 47 Fed. 674; Louisville, N. A. & C. R. Co. v. Ohio Val. I. & C. Co., 57 Fed. 42, 45; Nashville, C. & St. L. R. Co. v. McConnell, 82 Fed. 65, 75; Bailey v. Tillinghast, (C. C. A.), 99 Fed. 801, 806, 807 (a striking case); Smith v. Dobbins, 87 Ga. 303, 13 S. E. 496; Lockwood Co. v. Lawrence, 77 Me. 297; Farmington Village Corp. v. Sandy River Nat. Bank, 85 Me. 46, 26 Atl. 965; Town of Springport v. Teutonia Sav. Bank, 75 N. Y. 397; Kellogg v. Chenango Valley Savings Bank, 42 N. Y. Supp. 379, 11 App. Div. 458; and many other cases, chiefly recent, cited *ante*, note to § 261. For cases denying the jurisdiction, see *ante*, § 264, notes. For cases where the exercise of the jurisdiction would be ineffectual, or unnecessary, see *ante*, §§ 251½, 251¾, and notes. An important group of cases of this class comprises those where some act of a single defendant, such as an official board, in levying taxes, fixing rates, etc., is enjoined for the purpose of avoiding a multiplicity of suits, not with the single defendant, but with other persons. See *ante*, § 261, note (b), "Fourth Class," (I), (a), (b); Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418; Haverhill Gaslight Co. v. Barker, 109 Fed. 694; Cummings v. Merchants' Nat. Bank, 101 U. S. 153; Hills v. National Albany Exch. Bank, 105 U. S. 319, 5 Fed. 248; Albany City Nat. Bank v. Maher, 19 Blatch. 184, 6 Fed. 417; Whitney Nat. Bank v. Parker, 41 Fed. 402; Third Nat. Bank v. Mylin, 76 Fed. 385; Western Union Tel. Co. v. Poe, 61 Fed. 449, 453; Sanford v. Poe, 69 Fed. 546, 548, 16 C. C. A. 305, 60 L. R. A. 641; Western Union Tel. Co. v. Norman, 77 Fed. 13, 21; Taylor v. Louisville & N. R. Co., (C. C. A.), 88 Fed. 350; Pyle v. Brenneman, 122 Fed. 787; Chesapeake & O. R. Co. v. Miller, 19 W. Va. 408.

(e) See *ante*, § 261, note (b), "Class Fourth," (I), (a); Guess v. Stone Mountain I. & R. Co., 67 Ga. 215; South Carolina R. Co. v. Steiner, 44 Ga. 546; City of Albert Lea v. Nielsen, 83 Minn. 246, 86 N. W. 83; Kellogg v. Chenango Valley Sav.

§ 275. **Statutory Jurisdiction.**— In addition to the foregoing discussion of the doctrine as forming a part of the general equitable jurisdiction, there remains to be very briefly considered a statutory basis of the jurisdiction which is found in some of the American states. In the legislation of the various states which have adopted the reformed system of procedure, there is considerable diversity with respect to matters of detail; the attempt to put the rules concerning remedies and remedial rights, whether legal or equitable, into a statutory form is carried much further in some of the states than in others. This partial codification in several of the states has resulted in statutory provisions concerning certain equitable remedies which deal with, and to some extent regulate, the jurisdiction based upon the prevention of a multiplicity of suits. These provisions are partly declaratory of well-settled doctrines, and partly operate, perhaps, to extend the jurisdiction beyond its original limits; they do not, however, purport to define, regulate, and fix the jurisdiction as a whole.[a] The legislation of California may be taken as the type. The following provisions on the subject are found in its codes: "Except where otherwise provided by this title, a final injunction may be granted to prevent the breach of an obligation existing in favor of the applicant. . . . 3. Where the restraint is necessary to prevent a multiplicity of judicial proceedings."[1] "An injunction cannot be granted,— 1. To stay a judicial proceeding pending at the commencement of the action in which the injunction is demanded, unless such restraint is necessary to prevent a multiplicity of such proceedings."[2] The first of these provisions is plainly declaratory of the familiar doctrine of the general equitable jurisdiction. By the second provision the intent is clear to abolish the use of the injunction to restrain actions at law, in all ordinary cases where it had heretofore been so used; but to permit its use for that purpose whenever it might be necessary in order to prevent a multiplicity of suits. I have placed in the foot-note the decisions which have given a judicial interpretation to this clause.[3]

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[1] Cal. Civ. Code, § 3422.

[2] Cal. Civ. Code, § 3423. Also Dakota Civ. Code, §§ 2014, 2016, 2017.

Bank, 42 N. Y. Supp. 379, 11 App. Div. 458; National Park Bank v. Goddard, 62 Hun, 31, 16 N. Y. Supp. 343, 2 Ames Cas. Eq. Jur. 82; affirmed, 131 N. Y. 503, 30 N. E. 566, 1 Keener's Cas. Eq. Jur.

[a] For a statutory jurisdiction in Massachusetts, see Carr v. Silloway, 105 Mass. 543.

SECTION V.

THE DOCTRINE THAT THE JURISDICTION ONCE EXISTING IS NOT LOST BECAUSE THE COURTS OF LAW HAVE SUBSEQUENTLY ACQUIRED A LIKE AUTHORITY.

ANALYSIS.

§ 276. The doctrine is applied to both kinds of jurisdiction.
§§ 277, 278. Where the jurisdiction at law has been enlarged entirely by the action of the law courts.
§ 278. Ditto, examples.
§§ 279–281. Where the jurisdiction at law has been enlarged by statute.
§ 280. Ditto, examples.
§ 281. Where such statute destroys the previous equity jurisdiction.

§ 276. **Is Applied to Both Kinds of Jurisdiction.**— There is still another principle affecting the equitable jurisdiction, which remains to be considered in all its relations, namely: Whenever a court of equity, as a part of its inherent powers, had jurisdiction to interfere and grant relief in any particular case, or under any condition of facts and circumstances, such jurisdiction is not, in general, lost, or abridged, or affected because the courts of law may have subsequently acquired a jurisdiction to grant either the same or different relief, in the same kind of cases, and under the same facts or circumstances.[a] This principle has already been briefly mentioned as one source of the concurrent jurisdiction;[1] but, like the doctrines discussed in the preceding sections of this chapter, it also extends to and operates in the exclusive jurisdiction. In other words, the exclusive jurisdiction to grant purely equitable reliefs, as well as the concurrent jurisdiction to confer legal reliefs, is still preserved, although the common-law courts may have obtained authority to award *their* remedies to the same parties upon the same facts.

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[3] Uhlfelder v. Levy, 9 Cal. 607, 614, 615; Crowley v. Davis, 39 Cal. 268, 269; Pixley v. Huggins, 15 Cal. 134; Hockstacker v. Levy, 11 Cal. 76; Gorham v. Toomey, 9 Cal. 77; Anthony v. Dunlap, 8 Cal. 26; Rickett v. Johnson, 8 Cal. 34, 36; Revalk v. Kraemer, 8 Cal. 66, 71, 68 Am. Dec. 304; Chipman v. Hibbard, 8 Cal. 268, 270; Agard v. Valencia, 39 Cal. 292, 303; Flaherty v. Kelly, 51 Cal. 145.

§ 277. **Jurisdiction at Law Enlarged by the Law Courts.**— This subsequent jurisdiction of the courts of law may be acquired in either of two modes: by the virtual legislative action of the common-law judges themselves, or by express statutory legislation. In many instances it has happened that the law courts, by abandoning their old arbitrary rules, and by adopting notions which originated in the court of chancery, and by enlarging the scope and effect of the common-law actions, have in process of time obtained the power of giving even adequate relief in cases and under circumstances which formerly came within the exclusive domain of equity. In all such instances, the courts of equity have continued to assert and to exercise their own jurisdiction, for the reason that it could not be destroyed, or abridged, or even limited by any action of the common-law courts alone. The enlargement of the jurisdiction at law, by the ordinary process of legal development, has not, in general, affected the pre-existing jurisdiction of equity.[1] [a]

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§ 276, [1] See *ante*, § 182.

§ 277, [1] Eyre v. Everitt, 2 Russ. 381, 382, per Lord Eldon: "This court will not allow itself to be ousted of any part of its original jurisdiction because a court of law happens to fall in love with the same or a similar jurisdiction."

§ 276, (a) Quoted in Van Frank v. St. Louis, C. G. & Ft. S. R'y Co. (Mo.), 67 S. W. 688, 691; cited to this effect in Howell v. Moores, 127 Ill. 67, 19 N. E. 863; Rooney v. Michael, 84 Ala. 585, 4 South. 421; Condon v. Knoxville, C. G. & L. R. R. Co. (Tenn. Ch. App.), 35 S. W. 781.

§ 277, (a) Cited with approval in Converse v. Sickles, 44 N. Y. Supp.

§ 278. The following are some of the most important classes of cases in which this principle has been applied and the equitable jurisdiction has been exercised, although a court of law may maintain an action or allow a defense upon the same facts, and may give an adequate and perhaps the very same relief: In suits to recover a fund impressed with a trust, or where a trust relation in view of equity exists between the parties, where the plaintiff might recover the same sum by an action of assumpsit for money had and received, or like legal action;[1] [a] in suits involving fraud, mistake, or accident, the equitable jurisdiction being exercised to give appropriate relief to the injured party, although a court of law has assumed power to grant relief either affirmatively by action, or negatively by allowing a defense;[2] in suits growing out of the relation of suretyship, brought by a surety against his principal for an exoneration, or against co-sureties for a contribution, or against

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See also Collins v. Blantern, 2 Wils. 341, 350, per Wilmot, C. J.; Atkinson v. Leonard, 3 Brown Ch. 218, 224; Harrington v. Du Chatel, 1 Brown Ch. 124; Bromley v. Holland, 7 Ves. 3, 19–21; Kemp v. Pryor, 7 Ves. 237, 249, 250; Varet v. N. Y. Ins. Co., 7 Paige, 560, 567, 568; Rathbone v. Warren, 10 Johns. 587, 595; People v. Houghtaling, 7 Cal. 348, 351; Wells v. Pierce, 27 N. H. 503, 511–514; Irick v. Black, 17 N. J. Eq. 189, 198; Sailly v. Elmore, 2 Paige, 497, 499; Lane v. Marshall, 1 Heisk. 30, 34; State v. Adler, 1 Heisk. 543, 547, 548.

[1] Kemp v. Pryor, 7 Ves. 237, 249, 250; New York Ins. Co. v. Roulet, 24 Wend. 505; Varet v. N. Y. Ins. Co., 7 Paige, 560, 567, 568; Kirkpatrick v. McDonald, 11 Pa. St. 387, 392, 393.

[2] People v. Houghtaling, 7 Cal. 348, 351; Wells v. Pierce, 27 N. H. 503, 511–514; Babcock v. McCamant, 53 Ill. 214, 217; Boyce's Ex'rs v. Grundy, 3 Pet. 210, 215; Humphries v. Bartee, 10 Smedes & M. 282, 295, 296.

1080, 16 App. Div. 49 (affirmed, 161 N. Y. 666, 57 N. E. 1107).

The rule is stated in Sweeny v. Williams, 36 N. J. Eq. 627, as follows: "When courts of law have of their own notion extended their jurisdiction over cases theretofore solely cognizable in equity, the jurisdiction of the latter courts has been in no respect abridged, although when the jurisdiction at law has become well established, the equity jurisdiction has been in some cases declined."

(a) Thus, in Converse v. Sickles, 44 N. Y. Supp. 1080, 16 App. Div. 49 (affirmed, 161 N. Y. 666, 57 N. E. 1107), goods were obtained by fraud, and the creditor was allowed to maintain a bill to impress a trust upon the proceeds derived from the sale. This section of the text was cited as authority.

the creditor or the principal to be relieved from liability on account of the creditor's conduct, or for any other appropriate relief, although courts of law may give adequate relief to the surety by action upon implied contract, or by defense to an action brought against him by the creditor;[3] in suits by the assignee of a thing in action, brought in his own name as equitable owner, to collect the amount due;[4] [b] and in suits to set aside or to be relieved from, or to restrain an action or judgment at law upon, a contract which is illegal, although the illegality may, either by authority of the law courts themselves or by express statute, be set up as a defense to an action at law brought to enforce the contract, and may thus defeat a recovery thereon; as, for example, where the contract is usurious, or given for a gambling debt, or other illegal consideration, or is contrary to good morals.[5]

§ 279. Jurisdiction at Law Enlarged by Statute.— Where, on the other hand, the new power is conferred upon the law courts by statutory legislation, the rule is well settled that unless the statute contains negative words or other language expressly taking away the pre-existing equitable jurisdiction, or unless the whole scope of the statute, by its reasonable construction and its operation, shows a clear legislative intent to abolish that jurisdiction, the former jurisdiction of equity to grant its relief under the circumstances continues unabridged.[a] It follows, therefore, that where the statute merely by affirmative words empowers a court of law to interfere in the case, and to grant a remedy, even though such remedy may be adequate, and even though it may be special and equitable in its nature, the previous jurisdiction of equity generally remains.[1] [b]

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[3] Eyre v. Everitt, 2 Russ. 381, 382; Sailly v. Elmore, 2 Paige, 497, 499; Minturn v. Farmers' Loan & T. Co., 3 N. Y. 498, 500, 501; Rathbone v. Warren, 10 Johns. 587, 595, 596; King v. Baldwin, 17 Johns. 384, 388, 8 Am. Dec. 415; Irick v. Black, 17 N. J. Eq. 189, 198, 199; Wesley Church v. Moore, 10 Pa. St. 273, 278–282; Montagne v. Mitchell, 28 Ill. 481, 486; Smith v. Hays, 1 Jones Eq. 321, 323; Viele v. Hoag, 24 Vt. 46, 51; Hempstead v. Watkins, 6 Ark. 317, 355, 368, 42 Am. Dec. 696; Heath v. Derry Bank, 44 N. H. 174.

[4] Dobyns v. McGovern, 15 Mo. 662, 668; but the jurisdiction in such cases is practically very much limited. See Ontario Bk. v. Mumford, 2 Barb. Ch. 596, 615; *post*, § 281.

[5] Collins v. Blantern, 2 Wils. 341, 350, per Wilmot, C. J.; Bromley v. Holland, 7 Ves. 3, 18–20; Harrington v. Du Chatel, 1 Brown Ch. 124; Fanning v. Dunham, 5 Johns. Ch. 122, 9 Am. Dec. 283; Gough v. Pratt, 9 Md. 526; Thomas v. Watts, 9 Md. 536, note; Lucas v. Waul, 12 Smedes & M. 157; West v. Beanes, 3 Har. & J. 568; White v. Washington, 5 Gratt. 645, 649; but, as examples of circumstances in which the jurisdiction will not be exercised, see Thompson v. Berry, 3 Johns. Ch. 394, 398; Sample v. Barnes, 14 How. 70, 73, 75.

(b) See Taylor v. Reese, 44 Miss. 89. In this case it was held that the equity courts were not ousted of jurisdiction because the law courts permit a suit in the name of the payee, for the use of the beneficial equitable holder, and in the conduct of the suit regard the usee as the real plaintiff. "Because the law tribunals have derived an indirect remedy it should not oust the original jurisdiction of the chancery."

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[1] Atkinson v. Leonard, 3 Brown Ch. 218, 224; Toulmin v. Price, 5 Ves. 235, 238, 239; Ex parte Greenway, 6 Ves. 812, 813; East India Co. v. Boddam, 9 Ves. 464, 466–469; Howe v. Taylor, 6 Oreg. 284, 291, 292; Force v. City of Elizabeth, 27 N. J. Eq. 408; Case v. Fishback, 10 B. Mon. 40, 41; Holdron v. Simmons, 28 Ala. 629; Bright v. Newland, 4 Sneed, 440, 442; Payne v. Bullard, 23 Miss. 88, 90, 55 Am. Dec. 74; Crain v. Barnes, 1 Md. Ch. 151, 154; Mitchell v. Otey, 23 Miss. 236, 240; Wells v. Pierce, 27 N. H. 503, 511–514.

(a) Quoted in Crass v. Memphis & C. R. Co., 96 Ala. 447, 11 South. 480.

(b) Cited with approval in Howell v. Moores, 127 Ill. 67, 19 N. E. 863; Rooney v. Michael, 84 Ala. 585, 4 South. 421; Black v. Boyd, 50 Ohio St. 46, 33 N. E. 207; Moulton v. Smith, 16 R. I. 126, 27 Am. St. Rep. 728, 12 Atl. 891; Washburn v. Van Steenwyk, 32 Minn. 336, 349. For other statements of the rule see Darst v. Phillips, 41 Ohio St. 514; Sweeney v. Williams, 36 N. J. Eq. 627; Ludlow v. Simond, 2 Caines Cas. 1, 2 Am. Dec. 291; Filler v. Tyler, 91 Va. 458, 22 S. E. 235; Brandon v. Carter, 119 Mo. 572, 581, 41 Am. St. Rep. 673, 675, 24 S. W. 1035. In Black v. Boyd, 50 Ohio St. 46, 33 N. E. 207, the court said: "Statutes, however, that abrogate or abridge that jurisdiction are to be strictly construed, and if the restrictive purpose is not clear, it will not be extended by construction." In Thrasher v. Doig, 18 Fla. 809, the rule is stated as follows: "We cannot assent to the proposition that a remedy in equity once existing is taken away by the fact that a specific remedy at law has been created, unless the latter is expressly declared by the law to be the only remedy." But see Osborn v. Ordinary, 17 Ga. 123, 63 Am. Dec. 230, where the court said: "In reference to partitions, the establishment of lost papers, the foreclosure of mortgages, the settlement of accounts, etc. . . . notwithstanding, by the English law as adopted here, chancery may have had concurrent, or even exclusive jurisdiction over these or any other subject, still if full redress has been pro-

§ 280. The following are some of the instances in which this rule has been applied, and the equitable jurisdiction has been asserted, notwithstanding the statutory power given to the courts of law under the same condition of facts:[a] In suits upon lost instruments, bonds, notes, bills, and other contracts to recover the amount due;[1] [b] in suits for the establishment or admeasurement of dower, although a statutory authority over matters of dower has been given to other courts;[2] [c] in suits to be relieved from a contract liability on account of a failure of consideration, although a statute has permitted the fact to be set up as a defense in an action at law brought on the contract;[3] in suits to enforce a partnership liability or the payment of a firm debt by the estate of a deceased partner, although a statute has allowed a recovery by action at law under the same circumstances, and this legal remedy is adequate;[4] where a statute had authorized similar relief in the action by a court of law, it did not interfere with the equitable jurisdiction by suit to enforce an inchoate lien on a judgment debtor's land,

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[1] Atkinson v. Leonard, 3 Brown Ch. 218, 224; Toulmin v. Price, 5 Ves. 235, 238 (and see note 2, at end of the case, p. 240, Perkins's ed.); Ex parte Greenway, 6 Ves. 812, 813 (see notes at end of the case, p. 813, Perkins's ed.); East India Co. v. Boddam, 9 Ves. 464, 466–469; Howe v. Taylor, 6 Or. 284, 291,

vided by statute, equity in that case is ousted of its jurisdiction, unless a special case is made by the bill."

The rule of the text does not apply to those cases, necessarily rare, where courts of equity have invented a remedy *subsequently* to the creation of a remedy by statute in a particular state; the statutory remedy is exclusive in that state; Van Frank v. St. Louis, C. G. & Ft. S. R'y Co., (Mo.), 67 S. W. 688, 691. In that case the statutory remedy granting a lien to certain persons upon the property of an insolvent railroad company, being prior in respect to the time of its creation to the equitable remedy invented by the federal courts, giving priority over mortgage indebtedness to certain classes of floating debts of such companies, was held to be exclusive of the latter remedy.

(a) **Miscellaneous Illustrations of the Principle.**— In Crass v. Memphis & C. R. R. Co., 96 Ala. 447, 11 South. 480, it is held that a common carrier may maintain a bill to enforce a lien although a statute authorizes the sale of freight to pay charges. In Black v. Boyd, 50 Ohio St. 46, 33 N. E. 207, it was held that a statute providing for jury trial in actions for the recovery of money only does not abrogate the equitable jurisdiction in matters of account. In Kelly v. Lehigh Min. & Mfg. Co., 98 Va. 405, 81 Am. St. Rep. 736, 36 S. E. 511, it was held that a code provision which makes more effective the common-law remedy of detinue does not affect the jurisdiction of equity to decree the specific delivery of title papers to heirs-at-law, devisees, and other persons properly entitled to the custody and possession of the title deeds of their respective estates, where they are wrongfully detained or withheld from them. In Filler v. Tyler, 91 Va. 458, 22 S. E. 235, it was held that a married woman may obtain an injunction for the protection of her equitable separate estate although a statute may furnish a complete and adequate remedy at law. A statute enlarging the jurisdiction of courts of law in matters relating to husband and wife does not deprive equity of jurisdiction of a contract between husband and wife relating to separate property. Schroeder v. Loeber, 75 Md. 195, 23 Atl. 579, 24 Atl. 226. State statutes providing for set-offs at law do not deprive courts of the United States of jurisdiction in equity. Sowles v. First Nat. Bank, 100 Fed. 552.

(b) See also, supporting and citing the text, Bohart v. Chamberlain, 99 Mo. 622, 13 S. W. 85.

292; Allen v. Smith, 29 Ark. 74; Hickman v. Painter, 11 W. Va. 386; Force v. City of Elizabeth, 27 N. J. Eq. 408; Patton v. Campbell, 70 Ill. 72; Hardeman v. Battersby, 53 Ga. 36, 38 (case of a warehouseman's receipt for cotton lost or destroyed; a court of equity has jurisdiction of a suit to recover the cotton described in the contract); but see Mossop v. Eadon, 16 Ves. 430, 433, 434, in which the chancellor refused to entertain a suit on a lost note *not negotiable*, since the holder could recover at law. The reason given for this decision was, that in all such cases (where no *profert* was ever required at law), the only ground of the equitable jurisdiction was the *power of the court to order indemnity*, where indemnity was necessary, as in suits on lost *negotiable* instruments; but no indemnity being needed in cases of non-negotiable notes, equity could not interfere. This reasoning does not apply to those lost instruments of which *profert* was originally requisite in actions at law.

[2] Jones v. Jones, 28 Ark. 19, 20; Menifee v. Menifee, 8 Ark. 9.

[3] Case v. Fishback, 10 B. Mon. 40, 41; and see Bromley v. Holland, 7 Ves. 3, 18–20.

[4] Holdron v. Simmons, 28 Ala. 629; Ala. Code, § 2142.

(c) See also Efland v. Efland, 96 N. C. 493, 1 S. E. 858. In Bishop v. Woodward, 103 Ga. 281, 29 S. E. 968, the court said: "Under the practice prevailing in this state, the remedy provided in the Code must be followed as the exclusive remedy when it is applicable to the facts of the case, and the aid of a court of equity is not necessary to the assertion of the right of dower, or the protection and preservation of the dower estate. Where this remedy cannot, by its terms, be made to apply, or where, if it be applicable so far as the assignment of dower is concerned, but the aid of a court of equity is necessary to the assertion of the widow's right to dower, or to secure to her the enjoyment of the dower estate, a court of equity will, notwithstanding the provision of the Code, entertain a petition praying for the assignment of dower, and appropriate and adequate relief in aid thereof."

created by an imperfect levy by execution, where the execution and other papers had all been lost by the defendant's fraud or negligence;[5] [d] a statute authorizing a garnishment or attachment by a proceeding at law does not take away nor abridge the equity jurisdiction to enforce an equitable attachment or sequestration by suit under the same circumstances;[6] in suits by a ward against his guardian for an accounting or to enforce the trust duty, where a statute has given jurisdiction to common-law courts to grant any similar relief;[7] suit by a creditor to reach the separate property of a married woman, where an action at law for the same purpose has been permitted by statute;[8] [e] in suits to be relieved from an illegal contract, or to restrain an action brought or judgment obtained thereon, although a statute has permitted the illegality to be set up as a defense in bar of any recovery on the contract;[9] statutes permitting actions at law against an executor or administrator under particular circumstances, or for special purposes, do not interfere with the general equity jurisdiction over the administration of decedents' estates;[10][f] and statutes authorizing courts of law to grant some distinctively equitable relief to sureties, by means of proceedings in actions at law, do not alter nor abridge the equitable jurisdiction over suretyship, even in giving the very same relief;[11][g] and a statute giving common-law courts the power to correct a judgment fraudulently obtained does not affect the equity jurisdiction to relieve against fraudulent judgments; fraud is a matter of equitable cognizance, and the jurisdiction is not lost by legislation giving the same authority to courts of law;[12][h] it is held in several of the states which have not adopted the reformed system of procedure that the statutes permitting parties to actions at law to testify as witnesses on their own behalf, and to be examined on behalf of their adversaries, do not in any manner interfere with the ancillary jurisdiction of equity to maintain suits for a discovery without relief, in aid of proceedings at law;[13][i] but this conclusion is by no means unanimous. It has been decided in Pennsylvania that the peculiar system heretofore existing in that state of administering some equitable remedies through the machinery of actions at law is not abrogated by statutes which conferred a limited equity jurisdiction upon the courts.[14] The radical change in the equitable and legal procedure effected in many states, which permits equitable defenses to be set up, and even affirmative equitable relief to be obtained, by the defendant in an action at law has not, it has sometimes been held, abridged the former well-established jurisdiction of equity to restrain actions and judgments at law on the ground that the controversy involved some equitable right or interest;[15] [j] but this question has been differently answered by different courts, and on account of its great importance it will be separately examined in the following chapter.[16]

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[5] Bright v. Newland, 4 Sneed, 440, 442.

[6] King v. Payan, 18 Ark. 583, 587, 588; Payne v. Bullard, 23 Miss. 88, 90, 55 Am. Dec. 74 (suit by a judgment creditor of a corporation to recover from a stockholder the unpaid amount due on his stock, not affected by a statute allowing a garnishment at law of such stockholder); Lane v. Marshall, 1 Heisk. 30, 34; but see, *per contra*, McGough v. Insurance Bank, 2 Ga. 151, 153, 154, 46 Am. Dec. 382.

[7] Crain v. Barnes, 1 Md. Ch. 151, 154.

[8] Mitchell v. Otey, 23 Miss. 236, 240.

[9] Bromley v. Holland, 7 Ves. 3, 18-20; Harrington v. Du Chatel, 1 Brown Ch. 124; Clay v. Fry, 3 Bibb, 248, 6 Am. Dec. 654; Fanning v. Dunham, 5 Johns. Ch. 122, 9 Am. Dec. 283; Gough v. Pratt, 9 Md. 526; Thomas v. Watts, 9 Md. 526, note; Lucas v. Waul, 12 Smedes & M. 157; West v. Beanes, 3 Har. & J. 568; White v. Washington, 5 Gratt. 645, 648; Day v. Cummings, 19 Vt. 495; but, *per contra*, see Thompson v. Berry, 3 Johns. Ch. 394, 398; Sample v. Barnes, 14 How. 70, 73, 75.

(d) The statutory proceedings supplementary to execution have been held not to exclude the equitable remedy by creditor's bill. Enright v. Grant, 5 Utah, 334; *contra*, § 281, note. See on this question Pom. Eq. Rem., "Creditors' Bills."

(e) Cited to this effect in First Nat. Bank v. Albertson (N. J. Ch.), 47 Atl. 818. See also Rooney v. Michael, 84 Ala. 585, 4 South. 421; Phipps v. Kelly, 12 Oreg. 213, 6 Pac. 707.

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[10] Clark v. Henry's Adm'r, 9 Mo. 336, 338–340; Oliveira v. University of North Carolina, 1 Phill. Eq. 69, 70.

[11] Irick v. Black, 17 N. J. Eq. 189, 198, 199; Smith v. Hays, 1 Jones Eq. 321, 323; Hempstead v. Watkins, 6 Ark. 317, 355, 368, 42 Am. Dec. 696; Harlan v. Wingate's Adm'r, 2 J. J. Marsh. 139, 140.

[12] Babcock v. McCamant, 53 Ill. 214, 217.

[13] Cannon v. McNab, 48 Ala. 99; Millsaps v. Pfeiffer, 44 Miss. 805; but *per contra*, Riopelle v. Doellner, 26 Mich. 102; Hall v. Joiner, 1 S. C. 186; and see *ante*, §§ 193, 194.

(f) A statute giving probate courts jurisdiction of claims against estates, when the decedent has received money in trust for any purpose, does not exclude the jurisdiction of a court of equity to enforce the trust; Howell v. Moores, 127 Ill. 67, 19 N. E. 863, citing this section of the text. And an act authorizing the court of probate, in all cases, upon request of the life-tenant, to order the executor to deliver the property to him upon his giving a bond that it shall be forthcoming for the remainderman at the termination of the life estate does not interfere with the general chancery powers of a court of equity. Security Co. v. Hardenberg, 53 Conn. 169, 2 Atl. 391.

(g) Missouri Rev. Stats. 1899, §§ 4504–4509, providing for contribution between sureties, and authorizing an action at law by one surety, who has paid more than his proportion of the debt, to recover contribution from other sureties, does not deprive such surety of his right to sue in equity for contribution. Dysart v. Crow, 170 Mo. 275, 70 S. W. 689.

(h) See also Darst v. Phillips, 41 Ohio St. 514.

(i) In Union Passenger R'y Co. v. Mayor, etc., of Baltimore, 71 Md. 239, 17 Atl. 933, it was held that a stat-

§ 281. When Such Statute Destroys the Equity Jurisdiction.

— On the other hand, the decisions all admit that if the statute contains words negativing or expressly taking away the previous equitable jurisdiction, or even if, upon a fair and reasonable interpretation, the whole scope of the statute shows, by necessary intendment, a clear legislative intention to abrogate such jurisdiction, then the former jurisdiction of equity is thereby ended.[1] [a] The following examples will illustrate the effect of such enactments:[b] A statute authorizing common-law courts to render a judgment abating a private nuisance complained of in an action brought to recover damages therefor was held to have abrogated the equitable jurisdiction to entertain a suit for the same relief, although the jurisdiction to *restrain* a private nuisance remained unaltered.[2] [c] A statute permitting an action at law to recover compensation for work and labor or other services rendered to a trust estate on the employment of a trustee has taken away the jurisdiction of equity by suit to enforce such a demand as a lien upon the trust property.[3] [d] It has been held that a court of equity has no jurisdiction to entertain a suit to recover the amount due on a lost non-negotiable note, since the holder has a complete remedy at law.[4] The statutes permitting the parties to actions at law to be examined as witnesses are held, in several of the states, to abolish the auxiliary equitable jurisdiction of discovery in aid of proceedings in courts of law.[5] Whenever a legal right is wholly created by statute, and a legal remedy for its violation is also given by the same statute, a court of equity has no authority to interfere with its reliefs, even though the statutory remedy is difficult, uncertain, and incomplete.[6] [e] Finally, where there is no statute, the equitable jurisdiction may become unused, obsolete, and practically abolished, since the courts of law have assumed the power to grant a simple, certain, and perfectly efficient remedy. The practical abandonment of the equity jurisdiction over suits by the assignees of ordinary things in action is a striking illustration of the change which may thus be effected. As a general rule, a court of equity will not now entertain a suit brought by the assignee of a debt or of a chose in action which is a mere legal demand.[7] The recent statutes of many states, as well as of England, requiring the assignee to sue at law in his own name confirm and establish this rule.

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[14] Biddle v. Moore, 3 Pa. St. 161, 175, 176; Wesley Church v. Moore, 10 Pa. St. 273, 279–282. These cases arose under early statutes, which gave only a partial equity jurisdiction.

[15] Dorsey v. Reese, 14 B. Mon. 127, 128; and see, on this question, Erie Railway Co. v. Ramsey, 45 N. Y. 637; Schell v. Erie R'y Co., 51 Barb. 368.

[16] See *post*, § 357.

[1] See cases cited *ante*, in first note under § 279.

ute allowing discovery at law where it might be allowed in chancery did not abrogate the chancery jurisdiction.

(j) See Black v. Smith, 13 W. Va. 780.

(a) See MacLaury v. Hart, 121 N. Y. 636, 24 N. E. 1013, where the court said that "a court of equity is never at liberty to draw to its general jurisdiction a question remitted to a competent and sufficient authority by express command of a statute, unless under some very exceptional circumstances, which do not exist here." A statute provided for consolidation of

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[2] Remington v. Foster, 42 Wis. 608, 609.

[3] Askew v. Myrick, 54 Ala. 30.

[4] Messop v. Eadon, 16 Ves. 430, 433, 434; see cases cited *ante*, under §§ 279, 280.

[5] Hall v. Joiner, 1 S. C. 186; Riopelle v. Doellner, 26 Mich. 102. See §§ 193, 194, 209.

church corporations upon consent of the supreme court. It was held that equity could not take jurisdiction.

(b) In Moore v. McIntyre, 110 Mich. 237, 68 N. W. 130, a statutory remedy by certiorari in matters of special assessments was held to be exclusive. In Barnes v. Sammons, 128 Ind. 596, 27 N. E. 747, it was held that a surety cannot maintain a suit in equity to compel the owner of a promissory note to bring suit on it and proceed to collect it, for an adequate remedy is provided by sections 1210, 1211, Rev. St. 1881.

(c) Compare, however, Bushnell v. Robeson, 62 Iowa, 540, 17 N. W. 888, where a similar statute was held not to have imposed any exception upon a general statutory provision which read: "An injunction may be obtained in all cases where such relief would have been granted in equity previous to the adoption of this code."

(d) It has been held that statutory proceedings supplementary to execution are exclusive of the equitable remedy of a creditor's bill: Pacific Bank v. Robinson, 57 Cal. 520, 40 Am. Rep. 120; *contra*, see *ante*, § 280, note. See on this question Pom. Eq. Rem., "Creditors' Bills."

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[6] Janney v. Buel, 55 Ala. 408; Coleman v. Freeman, 3 Ga. 137.

[7] Ontario Bank v. Mumford, 2 Barb. Ch. 596, 615, per Walworth, C.: "As a general rule, this court will not entertain a suit brought by the assignee of a debt or of a chose in action which is a mere legal demand; but will leave him to his remedy at law by a suit in the name of the assignor (citing Carter v. United Ins. Co., 1 Johns. Ch. 463; Hammond v. Messinger, 9 Sim. 327; Moseley v. Boush, 4 Rand. 392; Adair v. Winchester, 7 Gill & J. 114; Smiley v. Bell, Mart. & Y. 378, 17 Am. Dec. 813). Where, however, special circumstances render it necessary for the assignee to come into a court of equity for relief, to prevent a failure of justice, he will be allowed to bring a suit here upon a mere legal demand"; citing as an example, Lenox v. Roberts, 2 Wheat. 373.

(e) See Dimmick v. Delaware, L. & W. R. R. Co., 180 Pa. St. 468, 36 Atl. 866. This paragraph of the text is cited to the same effect in Sheffield City Co. v. Tradesmen's Nat. Bank, 131 Ala. 185, 32 South. 598; citing Chandler v. Hanna, 73 Ala. 392 (statutory remedy for enforcement of mechanic's lien is exclusive); Walker v. Daimwood, 80 Ala. 245; Corrugating Co. v. Thacher, 87 Ala. 458, 465, 6 South. 366; Phillips v. Ash's Heirs, 63 Ala. 414; Wimberly v. Mayberry, 94 Ala. 255, 10 South. 157, 14 L. R. A. 305.

CHAPTER III.

THE JURISDICTION AS HELD BY THE COURTS OF THE SEVERAL STATES, AND BY THE COURTS OF THE UNITED STATES.

SECTION I.

ABSTRACT OF LEGISLATIVE PROVISIONS.

ANALYSIS.

§ 282. Source of jurisdiction, both legal and equitable, of the courts in the American states.
§ 283. Division of the states into four classes with respect to the amount of equity jurisdiction given to their courts.
§ 284. The first class of states.
§ 285. The second class of states.
§ 286. The third class of states.
§ 287. The fourth class of states.
§ 288. Summary of conclusions.

§ 282. **Source of the Jurisdiction of the American Courts.**— In the preceding chapters I have described the general equitable jurisdiction in its condition of complete development, unabridged by any express statutory legislation, as it has been exercised by the English court of chancery. As a matter of fact, however, this *unlimited* jurisdiction is not now possessed by any American tribunal, state or national. In every commonwealth some important branch of it has been lopped off by statute. It becomes necessary, therefore, that I should give, in addition to the foregoing general discussion, some account of the particular jurisdiction which now exists in the courts of each state and of the United States; that I should show to what extent the powers of the English chancery have been conferred or withheld by the state and national constitutions and legislation. To this end I shall first exhibit the statutory basis and authority for the jurisdiction which are found in the laws of the United States and of all the individual states. This preliminary explanation is absolutely essential to a correct understanding of the American equity jurisprudence, since the equitable powers held by all our courts, whether of the nation or of the states, are wholly derived from and measured by the provisions of statutes or of constitutions. The highest courts of original jurisdiction in each of the states are understood to derive their common-law powers, substantially co-extensive with those possessed by the superior law courts of England, merely from the fact of their being created as such tribunals, and without any express grant of authority being essential. Although such a grant of authority or enumeration of powers has frequently been made either by the constitutions or by the statutes of different states, this was really unnecessary. These tribunals are deemed to possess by their very creation all the common-law powers, not incompatible with our institutions, which have not been expressly withheld or prohibited, in the same manner as the state legislatures are understood to hold by their very creation all the authority of the English Parliament not expressly withdrawn by the national and state constitutions. It is not so with the equitable jurisdiction of the American courts. For that there must be an authority either expressly conferred, or given by necessary implication from the express terms, in some provision of the constitution or of a statute. In other words, the American state courts do not derive their equitable powers, as they do their common-law functions, as a part of the entire common-law system of jurisprudence which we have inherited from England, and which is assumed to exist even independently of legislation; their equitable jurisdiction is wholly the creature of statute, and is measured in each state by the extent and limitations of the statutory authority.[1]

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[1] It hardly need be said that the constitution of a state is here included under the designation "statute"; for the constitution is only a higher and more compulsory statute. Certain decisions may be found in a very few

§ 283. **Amount of Equity Jurisdiction — Four Classes of States.**— In some of the states this statutory delegation of power is so broad and comprehensive that the jurisdiction which it creates is substantially identical with that possessed by the English court of chancery, except so far as specific subjects, like administration, have been expressly given to different tribunals; but in others the delegation of power is so special in its nature and limited in its extent that a reference to the statutes themselves on the part of the courts as the source and measure of their jurisdiction is a matter of constant practice and of absolute necessity. A correct knowledge of these statutory provisions in the various states is of the highest importance from another point of view; without it the force and authority of decisions rendered in any particular state cannot be rightly appreciated by the bench and bar of other commonwealths.[1] It will not be found necessary to examine in detail the statutes of each state separately. A comparatively few distinct types of legislation have been adopted and closely followed throughout the constitutions and statutes; and it is possible to arrange all the states into a few classes, in each of which the equitable jurisdiction is substantially the same with respect to its statutory origin, nature, and extent, although some differences may exist in the judicial interpretation given to these legislative provisions. Such differences will be noticed in a subsequent section of this chapter. This classification is made without any reference to the external form and organization of the courts, and is based wholly upon the amount of equitable jurisdiction created and conferred by the legislation.

states holding that the equity jurisdiction of those states is commensurate with that possessed by the English chancery. In all these states, however, a constitutional provision not only created a court of equity, but in some sufficient words conferred upon it such a general jurisdiction.

[1] As an illustration, the modern decisions in Massachusetts upon questions of general equity jurisprudence, able and learned as they are, would often be very misleading in other states, if the statutes upon which the jurisdiction of its courts rests were not accurately known.

§ 284. 1. **Class First.**— The first class embraces those states in which the constitutions or statutes have in express terms created and conferred an equity jurisdiction identical or co-extensive with that possessed by the English court of chancery, so far as is compatible with our forms of government, political institutions, and public policy.[1] The jurisdiction thus taken as the criterion and measure is that held and exercised by the English *court* of chancery by virtue of its general powers as a court of justice; and it does not include that special authority or jurisdiction delegated to the *chancellor* individually, as a representative of the crown in its capacity of *parens patriæ.* This latter authority, so far as it exists at all, is possessed only by the state legislatures. The following states compose this class: Michigan, New York, Vermont.[2]

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[1] It should be noticed, however, that in all these states, notwithstanding the broad grant of general power, certain particular subjects belonging to the jurisdiction of the English chancery have been given to the exclusive cognizance of some other tribunal, and thus the general equitable jurisdiction has been abridged. The administration of decedents' estates is a very striking example, which has been intrusted to the probate courts.

[2] *Michigan.*— The constitution (art. VI.) establishes a supreme court with appellate jurisdiction only (§ 3), and circuit courts which "shall have original jurisdiction in all matters, civil and criminal, not excepted in this constitution, and not prohibited by law." 2 Comp. Laws 1871, chap. 176, § 1.[a] "The several circuit courts of this state shall be courts of chancery within and for their respective counties"; and Comp. Laws 1871, § 21:[b] "The powers and jurisdiction of the circuit courts in chancery in and for their respective counties shall be co-extensive with the powers and jurisdiction of the court of chancery in England, with the exceptions, additions, and limitations created and imposed by the constitution and laws of this state." These provisions were also found in the Revised Statutes of 1846 (chap. 90), which abolished the former *separate* court of chancery. The latter of the two sections above quoted (viz., § 21) was also found in the Revised Statutes of 1838 (p. 365, § 23), and applied to the then existing separate court of chancery.

New York.— The constitutions of 1777 and of 1822 established a separate court of chancery, and a supreme court with general original jurisdiction in law. The constitution of 1846, in its original form, and as amended in 1869, provides (art. VI., § 6), that "the supreme court shall have general jurisdiction in law and equity"; and by article XIV., sections 5 and 6, that all the powers of the former court of chancery are transferred to the supreme court.

(a) *Michigan.* — Howell's Stats. 1882, § 6592.

(b) *Michigan.* — Howell's Stats., § 6611.

§ 285. 2. **Class Second.**— The second class embraces those states in which the constitutions, not in express terms, but by necessary implication, create and confer a general equity jurisdiction substantially the same as that possessed by the English court of chancery, except so far as modified or limited by other portions of the state legislation. In this type of legislative action, no attempt is made by any clause to particularly define the extent of the jurisdiction by comparing it with that held by the English chancery; the language employed is always general; it declares that certain courts "have power to decide all cases in equity;" or that they "have jurisdiction in equity," or that they shall exercise their powers "according to the course of equity;" and it thereby plainly implies that the equity powers and jurisdiction thus recognized and conferred are substantially those possessed by the English court of chancery. In many of these states the general clause is added by way of limitation, that equity powers shall not exist where there is "a plain, adequate, and complete remedy at law." The effect given to this provision will be explained in the following section. It should be added, however, in this connection, that in many of the states the ordinary jurisdiction of equity thus conferred in such general terms is greatly abridged, restricted, or

The Revised Statutes, which went into operation in 1830, while the court of chancery was in existence, enact (5th ed., vol. 3, pt. III., chap. 1, tit. 2, art. 2, § 42, p. 264): "The powers and jurisdiction of the court of chancery are co-extensive with the powers and jurisdiction of the court of chancery in England, with the exceptions, additions, and limitations created and imposed by the constitution and laws of this state." This continues to be the measure of the equitable jurisdiction of the courts of New York, although both the legal and the equitable powers are now administered together by the same court and in the same proceeding.

Vermont.— The General Statutes of 1862–70 (tit. XV., chap. 20, § 4)[c] confer the equity jurisdiction upon the judges of the supreme court virtually acting as chancellors; and (Gen. Stats., § 2)[d] define the extent of that jurisdiction in language identical with that found in the statutes of *Michigan* and of *New York*, quoted above.

(c) And the Revised Laws of 1880, § 698.

(d) Rev. Laws, 695.

modified, with respect to some of its branches or heads, by other statutes, especially by those defining and regulating the powers of the various subordinate courts.[1] In this class, which is the most numerous of all, are included the following states: Alabama, California, Connecticut, Delaware, Florida, Georgia, Illinois, Iowa, Kentucky, Maryland, Mississippi, Nebraska, Nevada, New Jersey, North Carolina, Oregon, Rhode Island, Tennessee, Virginia, West Virginia, Wisconsin, and the United States.[2]

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[1] As illustrations, in several of the states the original jurisdiction over trusts is limited by statutes abolishing or restricting express trusts, and the like; and in nearly all, if not all, of them the jurisdiction over the administration of decedents' estates is greatly restricted, or perhaps taken away, by statutes giving exclusive power in such matters to courts of probate.

[2] I omit, in this note, all reference to courts of appellate jurisdiction, as unnecessary. It is enough to say that in every state, and in the United States, there is a tribunal with such a jurisdiction both in law and in equity.

United States.— Rev. Stats., § 629: "Circuit courts have jurisdiction in all suits of a civil nature, at common law and in equity, where the matter in dispute exceeds the sum or value of five hundred dollars," in the cases provided for by the constitution, and in a number of specified cases arising under statutes of Congress. § 723: "Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law." These provisions formed sections 11 and 16 of chapter 20 of the Laws of 1789, commonly known as the "Judiciary Act."

Alabama.— Rev. Code 1867, § 698:[a] "Ordinary jurisdiction. The powers and jurisdiction of the courts of chancery extend,— 1. To all civil causes in which a plain and adequate remedy is not provided in the other judicial tribunals; 2. To all cases founded on a gambling consideration, so far as to sustain a bill of discovery and grant relief; 3. To subject an equitable title or claim to real estate to the payment of debts; 4. To such other cases as may be provided by law." Rev. Code 1867, § 699:[b] "Extraordinary jurisdiction. Chancellors may exercise the extraordinary jurisdiction granted to such officer by the common law in cases of necessity when adequate provision has not been made for its exercise by some other officer or in other courts, and with the exceptions, limitations, and additions imposed by the laws of this state." The whole state is separated into three "chancery divisions," and a chancellor is appointed in each: Rev. Code 1867, §§ 695, 697.[c]

California.— Const. 1879, art. VI., § 4: "The supreme court shall have appellate jurisdiction in all cases in equity, except such as arise in justices' courts," and in all cases at law. § 5: "The superior courts shall have original jurisdiction in all cases in equity," and in cases at law. Code Civ.

(a) *Alabama.*— Code 1886, § 720.

(b) Code 1886, § 721.

(c) These "divisions" are now four in number. Code 1886, § 713.

§ 286. 3. **Class Third.**— The third class embraces those states in which the constitutions and statutes do not confer a general equity jurisdiction by any single comprehensive

Proc., § 57: "The jurisdiction of the superior courts extends,— 1. To all civil actions for relief formerly given in courts of equity," and also to other civil actions.

Connecticut.— Gen. Stats. 1875, p. 40, § 2: "The superior court shall have jurisdiction of all suits in equity which are not within the sole jurisdiction of other courts." P. 413, § 2: Jurisdiction, where the amount involved does not exceed five hundred dollars, is given to the court of common pleas, and for cases exceeding that amount, to the superior court. § 5: "Courts having jurisdiction in suits in equity shall proceed therein according to the rules and practice of equity, and take cognizance only of matters in which adequate relief cannot be had in the ordinary course of law." *Note*, however, that this clause, so far as it speaks about the "proceeding in suits in equity according to the *practice* of equity," has been modified by more recent legislation, which has adopted substantially the principles and methods of the reformed procedure (Practice Act of 1879), and which is mentioned in a subsequent paragraph.

Delaware.— The constitution (art. VI., § 3) establishes a court of chancery. § 5: "The chancellor shall hold the court of chancery. This court shall have all the jurisdiction and powers vested by the laws of this state in the court of chancery." § 13: "Until the general assembly shall otherwise provide, the chancellor shall exercise all the powers which any law of this state vests in the chancellor, besides the general powers of the court of chancery." Rev. Stats. 1852, p. 320, chap. 95, § 1: "The court of chancery shall have full power to hear and decree all matters and causes in equity; . . . provided, that the chancellor shall not have power to determine any matter wherein sufficient remedy may be had, by common law or statute, before any other court or jurisdiction of this state." Jurisdiction in several particular cases, or for particular reliefs, is also given by other statutory provisions.

Florida.— Bush's Digest of Statutes, 1872, chap. 92, § 22:[d] "Circuit courts shall have original jurisdiction in all cases of equity," and also of law. The constitution (art. VI., § 8) contains exactly the same provision. There is no further definition or description of the equitable jurisdiction.

Georgia.— Const. 1868, art. V., sec. 2, § 2: The supreme court has only an appellate jurisdiction. Sec. 3, § 2: The superior courts have "exclusive original jurisdiction in equity cases." Code 1873, p. 45, § 218:[e] The supreme court has an appellate jurisdiction only. Code 1873, p. 50, § 246:[f] The superior courts have original jurisdiction and authority in all civil causes,— "2. To exercise the powers of a court of equity."

Illinois.— Const., art. VI., § 12: "Circuit courts have original jurisdiction in all causes in law and equity." Gross's Ill. Stats. 1871–74, vol. 2, p. 31, chap. 21, § 1:[g] The circuit courts and the superior courts of Cook provision, or single grant of power, but enumerate and specify the particular and partial heads or divisions of equity jurisprudence over which the jurisdiction of the

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[d] *Florida.* — McLellan's Digest, 1881, chap. 52, § 22.

[e] *Georgia.*— Code 1882, p. 55.

[f] Code 1882, p. 62.

[g] *Illinois.* — Hurd's Ill. Rev. Stats. 1889, p. 212, chap. 22, § 1.

county (i. e., of Chicago), "in all causes of which they may have jurisdiction as courts of chancery, shall have power to proceed therein according to the mode herein provided, and when no provision is made by this act, according to the general usage and practice of courts of equity."

Iowa.— Const., art. 5, § 6: "The district court shall be a court of law and equity, which shall be distinct and separate jurisdictions." Code of 1873, § 161: "The district courts shall have and exercise general original jurisdiction, both civil and criminal, when not otherwise provided." § 162: "The circuit court shall have and exercise general original jurisdiction concurrent with the district courts in all civil actions and special proceedings." § 2507: All forms of action are abolished; but two kinds of proceeding by the "civil action" are allowed; namely, the "ordinary" and the "equitable." § 2508: "Plaintiff *may* prosecute his action by equitable proceedings in all cases where courts of equity, before the adoption of this code, had jurisdiction, and *must* so proceed in all cases where such jurisdiction was exclusive."

Kentucky.— Stanton's Rev. Stats. 1867, vol. 1, p. 310:[h] "The circuit court has original jurisdiction of all matters, both in law and equity, within its county, of which jurisdiction is not by law exclusively delegated to some other tribunal." Pp. 343, 360: A special court is established in certain districts for the hearing and decision of all equitable actions which would otherwise be heard by the circuit courts of those districts.

Maryland.— Code 1860, p. 82, § 56:[i] "The judges of the several judicial circuits, and the judge of the circuit court for Baltimore city, shall each, in his respective circuit, have and exercise all the power, authority, and jurisdiction which the court of chancery formerly held and exercised, except in so far as the same may be modified by this code." These courts also have original jurisdiction in cases at law.

Mississippi.— Const. 1868, art. VI., § 4: The supreme court has only an appellate jurisdiction. § 16: Chancery courts shall be established in each county. Rev. Code 1871, p. 191, chap. 9, art. 3, § 974:[j] "The chancery courts shall have full jurisdiction in all matters in equity, and of divorce and alimony; in all matters testamentary and of administration, in minors' business, and allotment of dower; and in cases of idiocy, lunacy, and persons *non compos mentis*, as well as of such other matters and cases as may be provided for by law."

Nebraska.— Const., art. XIV., § 3:[k] "The supreme court and the district courts shall have both chancery and common-law jurisdiction."[l]

(h) *Kentucky.*— Gen. Stats. 1887, p. 353.

(i) *Maryland.* — Pub. Gen. Laws 1888, art. 16, § 70.

(j) *Mississippi.*— Rev. Code 1880, § 1829.

(k) *Nebraska.* — Const. 1875, art. VI., § 9.

(l) Comp. Laws 1889, chap. 19, § 24: "The district courts shall have and exercise general, original, and appellate jurisdiction in all matters both civil and criminal, except where otherwise provided."

courts shall extend, with various restrictions and limitations. The equitable jurisdiction thus created in any state is not co-extensive with that possessed by the English court

Nevada.— Const., art. VI., § 6: "The district courts in the several judicial districts shall have original jurisdiction in all cases in equity," and also in cases at law. Comp. Laws 1873, § 925; Gen. Stats. 1885, § 2439: A provision exactly the same as the last preceding. Comp. Laws 1873, § 1064:m "There shall be in this state but one form of civil action," etc. This is section 1 of the Code of Civil Practice, passed March 8, 1869.

New Jersey.— The constitution (art. VI., § 1) establishes a court of errors and appeals of the last resort in all cases; a court of chancery; a supreme court; and circuit courts. § 4: The court of chancery shall consist of a chancellor. § 5: The supreme court and circuit courts have jurisdiction at law only. The Digest of Laws by Nixon (1709–1868) contains no statutory provision defining the extent of the chancery jurisdiction. A late statute has created the office of vice-chancellor.

North Carolina.— The constitution of 1868 (art. IV., § 1) abolishes the distinction between actions at law and suits in equity; and (§ 4) creates a supreme court and superior courts having jurisdiction in law and in equity. A code of procedure identical with that originally adopted in New York has been enacted. Rev. Code 1854, chap. 32, § 1: "Each superior court of law shall also be and act as a court of equity in the same county, and possess all the powers and authorities within the same that the court of chancery which was formerly held within this state under the colonial government used and exercised, and that are properly and rightfully incident to such a court."

Oregon.— The constitution (art. VII., § 1) creates a supreme court and circuit courts, etc., "having general jurisdiction, to be defined, limited, and regulated by law." § 9: "All judicial power, authority, and jurisdiction not vested by this constitution, or by laws consistent therewith, exclusively in some other court shall belong to the circuit courts." The Code of Civil Procedure (§ 1), General Laws of Oregon, 1872 (p. 105), abolishes all forms of action at law, but not the distinction between actions at law and suits in equity. Code Civ. Proc., § 376; Gen. Laws, p. 189: "The enforcement or protection of a private right, or the prevention of or redress for an injury thereto, shall be obtained by a suit in equity, in all cases where there is not a plain, adequate, and complete remedy at law; and may be obtained thereby in all cases where courts of equity have been used to exercise concurrent jurisdiction with courts of law, unless otherwise specially provided in this chapter."

Rhode Island.— The constitution (art. IV., § 1) creates a supreme court. § 2: "The court shall have such jurisdiction as may from time to time be granted by law. Chancery powers may be conferred on the supreme court, but on no other court to any greater extent than is now provided by law." Gen. Stats. 1872, p. 404, chap. 181, § 4:n "The supreme court shall have exclusive cognizance and jurisdiction of all suits and proceedings whatsoever in equity,

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(m) *Nevada.* — Gen. Stats. 1885, § 3023.

(n) *Rhode Island.* — Pub. Stats. 1882, p. 506, chap. 192, § 8.

of chancery, but is partial, and to a considerable extent fragmentary, since the more general clauses of the statutes have naturally been confined or restricted in their judicial

with full power to make and enforce all orders and decrees therein, and to issue all process therefor, according to the course of equity."

Tennessee.— The constitution (art. VI., § 1) establishes a supreme court, and "such circuit, chancery and other inferior courts as the legislature shall from time to time establish." § 8: "The jurisdiction of the chancery . . . courts shall be as now established by law until changed by the legislature." Comp. Stats. 1872, § 4279:(o) "The chancery courts shall continue to have all the powers, privileges, and jurisdiction properly and rightfully incident to a court of equity by existing laws." Comp. Stats. 1872, § 4280:(p) "They have exclusive original jurisdiction in all cases of an equitable nature, where the debt or demand exceeds fifty dollars, unless otherwise provided by this code." Other provisions give a power to grant equitable relief in certain specified cases, all of which, however, are embraced within the foregoing general authority.

Virginia.— Code 1860, chap. 158, § 5, p. 667:(q) "The circuit court of each county shall have jurisdiction in all cases in chancery and all actions at law." Certain local courts are also established in particular districts having the same jurisdiction. The high court of errors and appeals is entirely an appellate tribunal. No change in this jurisdiction seems to be made by subsequent statutes.

West Virginia.— Const., art. VI., § 6:(r) "Circuit courts shall have original and general jurisdiction of all matters at law and of all cases in equity." The Code of 1868 (chap. 112, § 1),(s) contains a provision identical with the foregoing.

Wisconsin.— Const., art. VII., § 2: "The judicial power of the state, both as to matters of law and equity, shall be vested in a supreme court, circuit courts," etc. § 8: Circuit courts have original jurisdiction "in all matters civil and criminal not excepted by this constitution or prohibited by law." Gen. Stats. 1871, vol. 2, chap. 116, § 5, p. 1303: Circuit courts "have original jurisdiction in all cases, both of law and equity"; and (§ 9) "shall have power to issue writs of injunction, . . . and all other writs, process, . . . according to the common usage of courts of record of common law and of equity jurisdiction."(t) Gen. Stats. 1871, § 22, p. 1306: "Circuit courts shall have original jurisdiction of all civil actions." The distinction between actions at law and suits in equity is abolished, and one "civil action" is established for all private rights and remedies.

(o) *Tennessee.*— Code 1884, § 5022.

(p) Code 1884, § 5023.

(q) *Virginia.*— Code 1887, § 3058.

(r) *West Virginia.* — Art. VIII., § 12.

(s) And the Code of 1884, chap. 112, § 2.

(t) *Wisconsin.* — Stats. 1889, § 2420: "The circuit courts have the general jurisdiction prescribed by the constitution. . . . They have the power to hear and determine, within their respective circuits, all civil actions and proceedings."

interpretation by the enumeration of special powers contained in other clauses. In all these states the legislation on the subject has been progressive. At an early day the equity jurisdiction was either wholly withdrawn from the courts, or else existed within extremely narrow bounds, and it has from time to time been enlarged by the legislature. For this reason the judicial decisions of all these states should be carefully examined and compared with the statutes in force at the time when they were rendered; otherwise their true scope and effect may be misapprehended. The following states are embraced in this class: Maine, Massachusetts, New Hampshire, Pennsylvania.[1]

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[1] *Maine.*— Rev. Stats. 1871, chap. 77, § 2, p. 581: The supreme judicial court has jurisdiction in law. § 5, p. 582: "It has jurisdiction as a court of equity in the following cases: 1. For the redemption of estates mortgaged; 2. For relief from forfeiture of penalties to the state, and from forfeitures in civil contracts and obligations, and in recognizances in criminal cases; 3. To compel the specific performance of written contracts, and to cancel and compel the discharge of written contracts, whether under seal or otherwise, when a full performance or payment has been made to the contracting party; 4. For relief in cases of fraud, trusts, accident, or mistake; 5. In cases of nuisance or waste; 6. In cases of partnership, and between the part owners of vessels and of other real and personal property, for adjustment of their interests in the property and accounts respecting it; 7. To determine the construction of wills, and whether an executor not expressly appointed a trustee becomes such from the provisions of a will; and in cases of doubt, the mode of executing a trust, and the expediency of making changes and investments of property held in trust; 8. In cases where the power is specially given by statute; and for discovery in the cases before named, according to the course of chancery practice; 9. When counties, cities, towns, or school districts, for a purpose not authorized by law, vote to pledge their credit, or to raise money by taxation, or to pay money from their treasury; or for such purpose any of their officers or agents attempt to pay out such money, the court shall have equity jurisdiction on application of not less than ten taxable inhabitants therein." § 7: "Writs of injunction may be issued in cases of equity jurisdiction, and when specially authorized by statute."

Laws 1873, chap. 140: "The supreme judicial court shall have jurisdiction in equity between partners or part owners, to adjust all matters of partnership between such part owners, compel contribution, and make final decrees."

Laws 1874, chap. 175, p. 126: Chapter 77 of the Revised Statutes (§ 5), quoted above, is amended by adding the following subdivision: "10. And shall have fully equity jurisdiction, according to the usage and practice of courts of equity, in all other cases, where there is not a plain, adequate, and complete remedy at law."

§ 287. 4. **Class Fourth.**—The fourth class embraces those states in which, from an abandonment of the ancient modes of procedure inherited from the law of England, the constitutions and statutes, in their grants of jurisdiction to the

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Laws of 1876 (chap. 101, p. 74) is amended by Laws of 1877 (chap. 158, p. 119). The same chapter 77 of the Revised Statutes (§ 5) is amended again, by adding the following subdivision: "10. In suits for the redelivery of goods or chattels taken or detained from the owner, and secreted or withheld, so that the same cannot be replieved; and in bills in equity by a creditor or creditors to reach and apply in payment of a debt any property, right, title, or interest, legal or equitable, of a debtor or debtors residing or found within this state, which cannot be come at to be attached or taken on execution in a suit at law against such debtor or debtors, and which is not exempt by law from such attachment and seizure, and any property or interest conveyed in fraud of creditors." Laws 1877, chap. 197, p. 143: The same chapter 77 of the Revised Statutes (§ 5) is amended by adding to the sixth subdivision the following words: "And in cases arising out of the law providing for the application of receipts and expenditures on railroads by trustees in possession under mortgage."

In addition to the foregoing grants of power, various provisions of the Revised Statutes also give an equitable remedy, or permit the court to interpose as a court of equity, in certain other special cases, as follows: P. 139, § 48, suits for the redemption of lands sold for non-payment of taxes; p. 245, § 29, suits by town officers to restrain county officials from improperly constructing a highway through the town; p. 331, § 10, suits between general and special partners; p. 336, § 5, suits by owners of cargo against ship-owners for discovery and payment, in cases of embezzlement, loss, or destruction of goods by master or seamen; p. 396, § 19, suits by a creditor or stockholder to wind up an expired corporation; p. 398, § 31, suits to compel contribution by stockholders, and to enforce their liability for the corporation debts; p. 399, §§ 34, 35, suits by judgment creditors against a corporation when its property cannot be reached by attachment or execution, or when it has made illegal dividends; pp. 410, 411, §§ 40, 46, suits by creditors against directors and stockholders of a bank for unlawful acts; p. 411, § 47, suits by a stockholder who has paid debts of a bank, against the directors and other stockholders for a contribution; p. 413, § 57, suits by official bank examiner to enjoin bank which has made over-issues, or is unsound; p. 417, § 74, suits by receivers of banks to recover unpaid assessments from stockholders, when necessary to meet demands against the bank; p. 422, §§ 99, 100, 101, suits by the trustees or by any depositor of an insolvent savings bank to compel a ratable distribution of its property; p. 450, § 10, suit by the person entitled against a railroad to compel payment of land damages awarded, when land has been taken, and to enjoin the railroad until they are paid; p. 458, § 53, suits by railroads to redeem from mortgages; p. 462, § 70, in all controversies relating to trustees, mortgages, and the foreclosure or redemption of mortgages of railroads; p. 464, § 77, suits to enforce awards made by railroad commissioners concerning controversies between connecting railroad lines and companies; p. 492, § 9, suits by a married woman to control and courts, make no distinction between, nor even any mention of, either the "law" or "equity." All these states, excepting Louisiana and Texas, have adopted the reformed American system of procedure. Their constitutions and

invest for her own use the damages awarded to her when her own separate property has been taken for public uses; p. 517, § 63, all controversies between co-executors or co-administrators, in the same manner as those between copartners; p. 541, §§ 10, 11, suits to enforce and regulate the execution of trusts; p. 565, § 14, suits to compel contribution among heirs, devisees, and legatees, whenever they are liable to contribute; p. 705, § 13, suits for redemption from mortgages; p. 787, § 6, suits to compel the specific performance of land contracts, after the vendor has died, against his heirs, devisees, administrators, or executors.

Massachusetts.— The following provisions, except where the date of their enactment is specially stated, are also found, with some difference of language, in the Revised Statutes of 1830: Gen. Stats. 1873, p. 558, chap. 113, § 2.[a] "The court may hear and determine in equity all cases hereinafter mentioned, when the parties have not a plain, adequate, and complete remedy at the common law, namely: 1. Suits for the redemption of mortgages, or to foreclose the same: 2. Suits and proceedings for the enforcing and regulating the execution of trusts, whether the trusts relate to real or personal estate; 3. Suits for the specific performance of written contracts, by and against either party to the contract, and his heirs, devisees, executors, administrators, and assigns; 4. Suits to compel the redelivery of goods and chattels taken or detained from the owner, and secreted or withheld so that the same cannot be replevied; 5. Suits for contribution by or between legatees, devisees, or heirs, who are liable for the debts of a deceased testator or intestate, and by or between any other persons respectively liable for the same debt or demand, when there is more than one person liable at the same time for the same contribution; 6. Other cases where there are more than two parties having distinct rights or interests which cannot be justly or definitely decided or adjusted in one action at the common law; 7. Suits between joint tenants, tenants in common, and copartners and their legal representatives, with authority to appoint receivers of rents and profits, and apportion and distribute the same to the discharge of encumbrances and liens on the estates, or among co-tenants; 8. Suits between joint trustees, co-administrators, and co-executors, and their legal representatives; 9. Suits concerning waste and nuisance, whether relating to real or personal estate; 10. Suits upon accounts, when the nature of the account is such that it cannot be conveniently and properly adjusted and settled in an action at law; 11. Bills by creditors to reach and apply in payment of a debt any property, right, title, or interest, legal or equitable, of a debtor, within this state, which cannot be come at to be attached or taken on execution in a suit at law against such debtor (Laws 1851, chap. 206; Laws 1858, chap. 34); 12. Cases of fraud and conveyance or transfer of real estate in the nature of mortgage (Laws 1855, chap. 194); 13. Cases of accident or mistake; 14. Suits or

(a) *Massachusetts.* — Gen. Stats. 1882, chap. 151, § 2.

statutes confer upon the courts complete power and jurisdiction to hear and determine *all civil causes,* or to grant all civil remedies; and they thus implicitly include a full jurisdiction in cases and over remedies of an equitable char-

bills for discovery, when a discovery may be lawfully required according to the course of proceedings in equity; 15. And shall have full equity jurisdiction according to the usage and practice of courts of equity in all other cases where there is not a plain, adequate, and complete remedy at law (Laws 1857, chap. 214)." By the Laws of 1875 (chap. 235),[b] jurisdiction is given to entertain creditors' suits by judgment creditors to reach property of the debtors fraudulenly transferred to or held by others. Other statutes confer special powers and remedies in particular cases, most of which, however, are covered by some one of the foregoing provisions. Laws 1877, chap. 178, p. 558, § 1:[c] "The supreme judicial court shall have jurisdiction in equity of all cases and matters of equity cognizable under the general principles of equity jurisprudence; and in respect of all such cases and matters shall be a court of general equity jurisdiction." Laws 1877, chap. 178, § 2: "The last paragraph of section 2 of chapter 113 of the General Statutes, beginning with the words 'And shall have,' is hereby repealed; but this repeal shall not affect any cause or proceeding now pending." This statute of 1877, it will be seen, confers a much broader and more unlimited jurisdiction than had been given by any previous legislative grant.[d]

New Hampshire.— Gen. Stats. 1867, p. 388, chap. 190, § 1: "The supreme court shall have the powers of a court of equity in cases cognizable in such courts, and may hear and determine, according to the course of equity, in cases of charitable uses, trusts, fraud, accident, or mistake; of the affairs of copartners, joint tenants or owners, or tenants in common; of the redemption and foreclosure of mortgages; of the assignment of dower; of contribution; of waste and nuisance; of specific performance of contracts; of discovery, when discovery may be had according to the course of proceeding in equity; and in all other cases where there is not a plain, adequate, and complete remedy at law, and such remedy may be had by proceedings according to the course of equity; may grant writs of injunction whenever the same is necessary to prevent fraud or injustice." § 2: "When goods or chattels are unlawfully withheld from the owner, proceedings in equity may be had for a discovery, for a restoration of the property, and for such other relief as the nature of the case and justice may require." Section 3 provides for a creditor's bill by a judgment creditor whose execution has been returned unsatisfied. Laws 1874, chap. 97, p. 340: This statute reorganizes the entire judicial system, changes the courts, and transfers all jurisdiction to the new courts; but makes no alteration in the existing jurisdiction itself.

Pennsylvania.— Prior to the legislation hereinafter mentioned, the courts of Pennsylvania possessed no equity jurisdiction whatever. To prevent the

(b) *Massachusetts.* — Gen. Stats. 1882, chap. 151, § 3.

(c) Laws 1882, chap. 151, § 4.

(d) By chapter 223 of the Laws of 1883, similar jurisdiction in equity is conferred upon the superior courts. Section 14 of the act permits equitable defenses in actions at law.

acter, as well as those of a legal nature. From considerations of convenience, and because the same principle of administration is *now* common to the whole group, I have added to this class all those other states which have adopted

absolute failure of justice, which would otherwise have followed, they had invented a curious system, by means of which some equitable principles and rules were enforced, and some equitable reliefs were given, through the ordinary common-law forms of action. For example, in the action of ejectment, an equitable right or title was permitted to be set up by the defendant, and then after the verdict of the jury the equities of the parties were worked out by an alternative or conditional judgment. This whole system was, of course, cumbrous, and could only be applied within narrow limits. The change made by the legislature has been gradual, and the final steps were quite recent, of which the following is a summary: Const. (as amended in 1838), art. V., § 6: "The supreme court and the several courts of common pleas shall, besides the powers heretofore usually exercised by them, have the power of a court of chancery, so far as relates to the perpetuation of testimony, the obtaining of evidence from places not within the state, and the cases of the persons and estates of those who are *non compos mentis;* and the legislature shall vest in the said courts such other powers to grant relief in equity as shall be found necessary; and may from time to time enlarge or diminish those powers, or vest them in such other courts as they shall judge proper for the due administration of justice." Const. 1873, art. V., § 1: A supreme court and courts of common pleas are established. § 3: The jurisdiction of the supreme court is appellate, except that "the judges shall have original jurisdiction in cases of injunction where a corporation is defendant." § 20: "The several courts of common pleas, besides the powers herein conferred, shall have and exercise, within their respective districts, subject to such changes as may be made by law, such chancery powers as are now vested by law in the several courts of common pleas of this commonwealth, or as may hereafter be conferred on them by law."

Brightly's edition of Purdon's Digest (1700–1872), vol. 1, p. 589 (Act of June 16, 1836, § 1):[e] "The supreme court and the several courts of common pleas shall have the jurisdiction and power of a court of chancery, so far as relates to,— 1. The perpetuation of testimony; 2. The obtaining of evidence from places not within the state; 3. The case of the persons and estates of those who are *non compos mentis;* 4. The control, removal, and discharge of trustees, and the appointment of trustees and the settlement of their accounts; 5. The supervision and control of all corporations other than those of a municipal character, and unincorporated societies and associations and partnerships; 6. The care of trust moneys and property, and other moneys and property made liable to the control of the said courts; and in such other cases as the said courts have heretofore possessed such jurisdiction and powers under the constitution and laws of this commonwealth." § 2: "The supreme court when sitting in bank in the city of Philadelphia (extended by act of July 26, 1842, to the judges

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(e) Ed. of 1883, vol. 1, p. 680.

the reformed procedure, but which have already been mentioned either in the first or the second of the foregoing classes. As a matter of fact, in all the commonwealths where the reformed procedure prevails, there is substan-

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thereof sitting at *nisi prius* in said city), and the court of common pleas for the said city and county shall, besides the powers and jurisdiction aforesaid, have the powers and jurisdiction of courts of chancery so far as relates to,— 1. The supervision and control of partnerships and corporations other than municipal; 2. The care of trust moneys and property and other moneys and property made liable to the control of the said courts; 3. The discovery of facts made material to the just determination of issues and other questions arising or depending in said courts; 4. The determination of rights to property or money claimed by two or more persons, in the hands or possession of a person claiming no right or property therein; 5. The prevention or restraint of the commission or continuance of acts contrary to law and prejudicial to the interests of the community or the rights of individuals; 6. The affording specific relief when a recovery in damages would be an inadequate remedy." Act of June 13, 1840: "The equity jurisdiction of the supreme court within the city of Philadelphia and of the court of common pleas for said city shall be extended to all cases arising in said city over which courts of chancery entertain jurisdiction on the grounds of fraud, mistake, accident, or account." By the act of April 11, 1845, it was declared that this provision "should be construed to include all cases of fraud, actual or constructive." Act of October 13, 1840: "The supreme court, district courts, and courts of common pleas within this commonwealth shall have all the powers and jurisdiction of courts of chancery in settling partnership accounts and such other accounts and claims as by the common law and usages of this commonwealth have hitherto been settled by the action of 'account render,' and plaintiff can sue either in equity or at law." Act of April 10, 1848: "The supreme court and court of common pleas in Philadelphia shall have the jurisdiction of courts of chancery in all suits for the discovery of facts." Act of April 25, 1850: The powers conferred (by act of June 16, 1836, above), concerning the perpetuation of testimony, are extended to all cases of perpetuating lost records. Act of April 8, 1852: The jurisdiction conferred by the foregoing acts upon the supreme court in and for the city of Philadelphia is extended throughout the entire state; "provided that said court shall not have original jurisdiction by virtue of this act to supervise any partnerships or unincorporated associations or societies." Act of February 14, 1857: The jurisdiction vested by the foregoing acts in the district court or the court of common pleas in and for Philadelphia is extended to all the courts of common pleas, throughout the state. In addition to the foregoing somewhat general grants of authority, other statutes have from time to time given jurisdiction or power to grant special relief under various particular circumstances, the most important of which are the following: Act of June 16, 1836: Bills for discovery in favor of judgment creditors are allowed. Act of March 17, 1845: The supreme court for the eastern district of the state, and the court of common pleas for Philadelphia, have jurisdiction of all cases of dower and of partition within Philadelphia;

tially the same amount of equitable jurisdiction, and there are also the same limitations upon the extent and exercise of that jurisdiction growing out of the radical change in the modes of administering it effected by the reformatory legislation. The fourth class is thus composed of the following states: Arkansas, Indiana, Kansas, Louisiana, Minnesota, Missouri, Ohio, South Carolina, Texas, and those which have already been mentioned: California, Connecticut, Iowa, Kentucky, Nebraska, Nevada, New York, North Carolina, Oregon, Wisconsin. To these may be added several of the territories.[1]

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and by act of April 15, 1858, the same courts have a like jurisdiction in cases of disputed boundary within the same city. Act of April 25, 1850: Suits in equity for an accounting between co-owners of mines or minerals are allowed. Act of April 11, 1862: The supreme court has all the powers of chancery in all cases of mortgages given by corporations. Statute of March 15, 1873, p. 301: The act of April 5, 1860, abridging the equity jurisdiction in Philadelphia, is repealed, and the equity jurisdiction of the district court in Philadelphia is restored as it was before said act. Statutes of 1876, May 5, p. 123: All courts of common pleas have all the powers of a court of chancery in all cases of or for the enforcing of mortgages on the property or franchises of any railroad, canal, or navigation corporation situated within the state. Statutes of 1876, May 8, p. 134: Equity jurisdiction in partition is enlarged so that any and every proper relief may be given by the decree of the court.

[1] *Arkansas.*— Const. 1868, art. VII., § 1: A supreme court and circuit courts are created. § 4: "The supreme court shall have general supervision and control over all inferior courts of law and equity." § 5: "The inferior courts of the state as now constituted by law shall remain with the same jurisdiction as they now possess," subject to the power of the legislature to alter. Dig. of Stats. 1874, § 1182:[a] Circuit courts have original jurisdiction in all civil actions. Dig. 1874, § 1183:[b] "They shall have exclusive original jurisdiction in each county in which they may be held, except in the county of Pulaski, as courts of equity, in all cases where adequate relief cannot be had by the ordinary course of proceedings at law." Dig. 1874, §§ 1208, 1209:[c] A separate chancery court is established in the county of Pulaski, which has jurisdiction of all equity cases arising in that county. Dig. 1874, p. 798, § 4450:[d] All forms of action are abolished. Dig. 1874, § 4451:[e] There shall be one form of action for the maintenance of all private rights and the granting of all private remedies, called the civil action. Dig. 1874, § 4453:[f] The proceedings in civil actions may be either at law or in equity. Dig. 1874, § 4454:[g] The civil action "*may* be by equitable proceedings in

(a) *Arkansas.*— Dig. of Stats. 1884, § 1357.

(b) Dig. 1884, § 1358.

(c) Dig. 1884, §§ 1380, 1381.

(d) Dig. 1884, § 4914.

(e) Dig. 1884, § 4915.

(f) Dig. 1884, § 4917.

(g) Dig. 1884, § 4918.

§ 288. **Conclusions.**— Although it is apparent from the foregoing summary that there is a very general agreement with respect to the amount of equity jurisdiction conferred upon the courts by this fundamental legislation of the vari-

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all cases where courts of equity, before the adoption of this statute, had jurisdiction, and *must* be in all cases where such jurisdiction was exclusive." This provision is substantially the same as the corresponding one in Iowa, Kentucky, and Oregon.

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Connecticut. — In addition to the citations given *ante*, in not describing the second class, the recent Practice Act of 1879 (Pub. Acts 1879, p. 432)[i] contains the following provisions: § 1: "There shall be hereafter but one form of civil action." § 6: "All courts which are vested with jurisdiction both at law and in equity may hereafter, to the full extent of their respective jurisdictions, administer legal and equitable rights, and apply legal and equitable remedies, in favor of either party, in one and the same suit; so that legal and equitable rights of the parties may be enforced and protected in one action; provided, that wherever there is any variance between the rules of equity and the rules of the common law in reference to the same matter, *the rules of equity shall prevail.*"

The other states included in this fourth class because they have also adopted the reformed system of procedure are described *ante*, in notes to the first and second classes.

Indiana.— Const., art. VII., § 8: "Circuit courts shall have such civil and criminal jurisdiction as may be prescribed by law." § 20: Commissioners must be appointed to simplify the practice. "They shall provide for abolishing the forms of actions at law now in use, and that justice shall be administered in a uniform mode of pleading, without distinction between law and equity." Gavin and Hord's Ind. Stats., vol. 2, p. 7, chap. 14: "Circuit courts shall have jurisdiction of all kinds of civil actions." "Such courts shall have power to make all proper judgments, sentences, decrees, orders, and injunctions, and to issue all processes, and to do such other acts as may be proper to carry into effect the same, in conformity with the constitution and laws of this state."[j]

(h) *Colorado.* — Const., art. VI., § 11: "The district courts shall have original jurisdiction of all causes, both at law and in equity." Code Proc., § 1: "The distinction between actions at law and suits in equity, and the distinct forms of action, and suits heretofore existing are abolished, and there shall be in this state but one form of civil action for the enforcement or protection of private rights, and the redress or prevention of private wrongs, which shall be the same at law and in equity, and which shall be denominated a civil action."

(i) *Connecticut.*— Gen. Stats. 1888, §§ 872, 877.

(j) *Indiana.* — Rev. Stats. 1888, § 1314; Stats. 1881, p. 102: "Circuit courts shall have original exclusive jurisdiction in all cases at law and in equity whatsoever, . . . except where exclusive or concurrent ous states, since the whole power belonging to a court of chancery seems to be given either expressly or impliedly in all the commonwealths with a few exceptions, yet practically such a complete uniformity by no means exists. The

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Kansas.— Const., art. III., § 6: "District courts shall have such jurisdiction as may be provided by law;" that of the supreme court is entirely appellate. Gen. Stats. 1868, p. 304, chap. 28, § 1: District courts "shall have a general original jurisdiction of all matters, civil and criminal, not otherwise provided by law."

Minnesota.— Stats. at Large of 1873, p. 723, § 17: "District courts shall have original jurisdiction of all civil actions." § 18: "The district courts have original jurisdiction in equity, and all suits or proceedings instituted for equitable relief are to be commenced, prosecuted, and conducted to a final decision and judgment by the like process, pleadings, trial, and proceedings as in civil actions, and shall be called civil actions." Stats. 1866, chap. 64, tit. I.

Missouri.— Const., art. VI., § 13: Circuit courts "shall have exclusive original jurisdiction in all civil cases which shall not be cognizable before justices of the peace." Wagner's Stats. 1870, p. 431, § 2: "Circuit courts shall have . . . exclusive original jurisdiction in all civil cases which shall not be cognizable before county courts and justices of the peace."
[k, l]

Ohio.— Const., art. XIV., § 3: Courts of common pleas are the tribunals of original general jurisdiction throughout the state; and (§ 4) they have "such jurisdiction as shall be conferred by law." There is also a superior court of the city of Cincinnati possessing the same jurisdiction within certain territorial limits. Swan and Critchfield's Rev. Stats. 1870, p. 386, chap. 32, § 33:[m] Courts of common pleas "shall have original jurisdiction in all civil cases where the sum or matter in dispute exceeds the exclusive original jurisdiction of justices of the peace." A like power is given to the superior court of Cincinnati within its territorial limits.

South Carolina.— The constitution of 1868 provides for an appellate court and lower courts of original jurisdiction; and that the distinction between suits in equity and actions at law shall be abolished. Prior to this revision of the constitution, law and equity had been administered by dis-

jurisdiction is or may be conferred by law upon justices of the peace."

Section 287 of the text is cited in Blair v. Smith, 114 Ind. 114, 15 N. E. 817.

(k) *Montana.* — Const., art. VIII., § 11: "The district courts shall have original jurisdiction in all cases at law and in equity." § 28: "There shall be but one form of civil action, and law and equity may be administered in the same action."

(l) *North Dakota.*— Const., § 103: "The district court shall have original jurisdiction, except as otherwise provided in this constitution, of all causes, both at law and equity." By section 111, provision is made for conferring general jurisdiction on certain county (probate) courts.

(m) *Ohio.* — Smith & Benedict's **Rev. Stats. 1890, p. 124, § 456.**

real condition of the jurisdiction as it is administered in the different groups of states requires a brief statement of the judicial interpretation which has been given to the constitutional and statutory grants of power, either taken separately or arranged according to their respective types. This judicial interpretation is described in the following section.

tinct tribunals. In 1870 a code of procedure was adopted similar in all respects to the like code which had prevailed in New York since 1849, by which the legal and equitable jurisdictions are combined in the same proceedings.

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In two other states of this class all distinction between legal and equitable actions has been abandoned, but the peculiar methods of the reformed procedure have not been adopted. The law of Louisiana, both with respect to substantive or primary rights and to remedies, is based upon the "civil law" as that had been modified and reconstructed by the French codes. The substantive law of Texas has also a large element of the "civil law," but recognizes the common law and the principles of equity. Its remedial procedure provides one form of action for all kinds of relief, but does not copy either the common-law or the chancery methods. In each of these states many of the principles, doctrines, and remedies of equity constitute a part of the jurisprudence, for no enlightened system could be without them.

Texas.— Const. 1869, art. V., § 3: The supreme court has only an appellate jurisdiction. § 7: "District courts have original jurisdiction of all suits, without regard to any distinction between law and equity, when the value of the matter in controversy is one hundred dollars or more."

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(n) *South Dakota.*— Const., art. V., § 14: "The circuit courts shall have original jurisdiction of all actions and causes, both at law and in equity." General jurisdiction may be conferred by statute on county (probate) courts.

(o) *Washington.*— Const., art. IV., § 6: "The superior court shall have original jurisdiction in all cases in equity," and in many cases at law.

(p) *Wyoming.* — Const., art. V., § 10: "The district court shall have original jurisdiction of all causes, both at law and in equity."

SECTION II.

THE JURISDICTION AS ESTABLISHED BY JUDICIAL INTERPRETATION.

ANALYSIS.

§ 289. The questions to be examined stated.
§ 290. Diversity of statutory interpretation in different states.
§§ 291–298. United States courts, equity jurisdiction of.
§ 292. First principle: Uniformity of jurisdiction.
§ 293. Second principle: Identity of jurisdiction.
§ 294. Third principle: Extent of the jurisdiction.
§ 295. Fourth principle: Inadequacy of legal remedies.
§§ 296, 297. Illustrations.
§ 297. Ditto; effect of state laws on the subject-matter of the jurisdiction.
§ 298. Territorial limitations on the jurisdiction.
§§ 299–341. States in which only a special and partial jurisdiction has been given by statute.
§§ 299–310. New Hampshire.
§§ 311–321. Massachusetts.
§§ 322–337. Maine.
§§ 338–341. Pennsylvania.
§§ 342–352. The other states in which a general jurisdiction has been given.
§ 342. What states are included in this division.
§ 343. Questions to be examined stated.
§ 344. Interpretation of statute limiting the jurisdiction to cases for which the legal remedy is inadequate.
§ 345. General extent of the statutory jurisdiction; the states arranged in the foot-note.
§§ 346–352. How far this equity jurisdiction extends to the administration of decedents' estates.
§ 347. Probate courts, jurisdiction and powers of.
§ 348. Class first: The ordinary equity jurisdiction over administrations expressly abolished.
§ 349. Class second: Such jurisdiction practically abrogated or obsolete.
§ 350. Class third: Such jurisdiction still existing and actually concurrent.
§§ 351, 352. Special subjects of equity jurisdiction connected with or growing out of administrations.
§§ 353–358. States which have adopted the reformed system of procedure.
§ 354. General effect of this procedure on the equity jurisdiction.
§§ 355–358. Its particular effects upon equity.
§ 356. On certain equitable interests and rights.
§ 357. On certain equitable remedies.
§ 358. On the doctrine as to inadequacy of legal remedies.

§ 289. **Questions Stated.**—Having collected the legislative grants of equitable jurisdiction, I shall now, for the purpose of arriving at a practical result, describe in a very brief and condensed manner the judicial interpretation which has been given to them. It will not be necessary to examine each of them separately; they may, with a very few exceptions, be conveniently grouped and discussed according to three or four prevailing types. It was remarked at the close of the last section that while there appeared to be a very general agreement on the amount of equitable jurisdiction conferred by the constitutions and statutes, yet practically such a complete uniformity does not exist. This actual condition results from several causes.

§ 290. **Different Theories of Interpretation.**— In the first place, a marked diversity will be found in the fundamental motives and theory of the judicial interpretation put upon these legislative provisions by the courts of different states. In some of them a strong tendency has been shown to lay much stress upon the limiting clauses contained in the statutory grants of authority, and to give a broad meaning and controlling operation to such clauses as those which restrict the equitable jurisdiction to cases " where there is no plain, adequate, and complete remedy at law." In others, the tendency has been towards a more liberal construction; to hold that these and similar clauses are simply declaratory of a familiar principle embodied in the general theory of equity jurisdiction, and add no restriction whatever to the extent of jurisdiction which would have been conferred without their presence; in short, that they merely state a limitation which is necessarily involved in the very conception of the equitable jurisdiction. In the second place, the apparent uniformity in the jurisdiction created by these general provisions has been greatly interfered with, and even destroyed, by the different systems of legislation adopted by various states with reference to many important branches of the municipal law, which originally, and prior to any statutory interposition, formed a part of the equity jurisprudence. In many, and perhaps most, of the states, subjects which fell within the domain of equity, and which were governed by equitable doctrines as administered by the court of chancery, have been wholly subjected to a statutory regulation, and committed to special tribunals, such as the courts of probate, so that the interference of equity is no longer necessary, even if it is possible. Other departments of the municipal law — as, for example, trusts and married women's property — have been modified by legislation, so that the material upon which the equity jurisdiction acted has been altered, limited, or perhaps enlarged. Some of these changes have already been described. This same method of modifying the equitable jurisdiction has even been carried out to a much greater extent. In several of the states, the municipal law has been, either wholly or in large part, reduced to a codified form, and the doctrines and rules, both of law and equity, have thus been combined into one statutory system; or at least, the division walls between them have, to a considerable extent, been broken down. From these facts, the conclusion is evident, that in order to ascertain the actual jurisdiction of equity as it now exists in the different states, an examination is requisite both of the judicial decisions interpreting its fundamental grants of power, and of the statutes which have modified the subject-matter upon which it acts. In the brief examination of the judicial construction which follows, I shall consider first and separately the United States, and shall then take up the several states, arranged in a few groups.

§ 291. **The United States.**—The constitution of the United States recognizes equity as a part of the national jurisprudence inherited from England at the time of the Revolution, and the equitable jurisdiction as a part of the judicial powers conferred upon the national tribunals. The statutes of Congress have, as is seen by the extracts given in the preceding section, acted upon this constitutional provision; and have, in broad terms, intrusted the exercise of this jurisdiction to the courts of original jurisdiction, which are established throughout the states, and to the supreme court created by the constitution as the appellate tribunal of last resort. In giving a judicial interpretation to these constitutional and statutory enactments, the national courts have, by numerous decisions, settled the following principles, which may justly be regarded as the foundations of the equitable powers possessed by the national judiciary.

§ 292. **First Principle: Uniformity.**— The equitable jurisdiction of the national courts, being derived wholly from the United States constitution and statutes, exists uniformly and to its full extent throughout the entire Union, independent of and unaffected by any state laws, or any peculiar system of jurisprudence and legislation adopted by individual states. It is the same in Louisiana with its civil-law code, in California with its code combining legal and equitable doctrines, and in New Jersey, which has preserved the ancient English system of common law and equity almost unaffected by modern legal reform. Whatever may be the municipal law of any particular state, either in its substance or its form, the United States courts in that state preserve their equitable jurisdiction, and administer the equitable jurisprudence unchanged by such local legislation. It follows, as a necessary consequence from this principle, that the reformed system of procedure now prevailing in many states and territories, whereby all distinction between suits in equity and at law is abolished, and all rights are maintained and all reliefs procured by means of one judicial proceeding, called the "civil action," has not in the least affected either the doctrines of equity jurisprudence administered, nor the extent and modes of equity jurisdiction exercised, by the national courts situated and acting within the same commonwealth.[1] [a]

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[1] This result of the principle stated in the text is recognized and followed by the most recent legislation of Congress upon the subject. U. S. Rev. Stats., § 914 (Laws of 1872, chap. 255, § 5, 17 Stats. at Large, p. 197), provides that practice, pleading, forms, and modes of proceeding in civil causes,

(a) In further support of the principle of this and the next following paragraph, see Boyle v. Zacharie & Turner, 6 Pet. 648, 8 L. ed. 532, by Story, J.; Russell v. Southard, 12 How. 148, 13 L. ed. 931; Neves v. Scott, 13 How. 270, 14 L. ed. 140; Pennsylvania v. Wheeling Bridge Co.,

§ 293. **Second Principle: Identity.**— The second principle is a corollary of the first. The equitable jurisdiction is the same with respect to its nature and extent in all the states, and is wholly unmodified and unabridged by state

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other than in equity or in admiralty, shall conform as near as may be to the forms, pleading, etc., existing at the time in like causes in the courts of record of the state within which the United States court is held. This provision preserves the equity methods unchanged by the state laws. The following cases maintain the doctrine formulated in the text: Bodley v. Taylor, 5 Cranch, 191, 221, 222; Livingston v. Story, 9 Pet. 632 (equity jurisdiction in Louisiana); Clark v. Smith, 13 Pet. 195, 203; Watkins v. Holman, 16 Pet. 25, 26, 58, 59; Bennett v. Butterworth, 11 How. 669, 674, 675; Stinson v. Dousman, 20 How. 461, 464; Greer v. Mezes, 24 How. 268, 277, per Grier, J.; Lessee of Smith v. McCann, 24 How. 398, 403; Barber v. Barber, 21 How. 582, 591, 592; Noonan v. Lee, 2 Black, 499, 509; Thompson v. Railroad Co., 6 Wall. 134, 137; Dunphy v. Kleinsmith, 11 Wall. 610, 614; Walker v. Dreville, 12 Wall. 440 (in Louisiana); Basey v. Gallagher, 20 Wall. 670, 679, 1 Mont. Ter. 457; Case of Broderick's Will, 21 Wall. 503; Shuford v. Cain, 1 Abb. 302, 305; Loring v. Downer, 1 McAll. 360, 362; Mezes v. Greer, 1 McAll. 401, 402; Byrd v. Badger, 1 McAll. 443, 444; Lorman v. Clarke, 2 McLean, 568; Putnam v. City of New Albany, 4 Biss.

18 How. 460, 15 L. ed. 449; Hipp v. Babin, 19 How. 271, 15 L. ed. 633; Bronson v. Schulten, 104 U. S. 410, 26 L. ed. 797; In re Sawyer, 124 U. S. 200, 210, 8 Sup. Ct. 487; Willard v. Wood, 135 U. S. 309, 10 Sup. Ct. 831; Dodge v. Tulleys, 144 U. S. 451, 12 Sup. Ct. 728; California v. Southern Pac. Co., 157 U. S. 229, 15 Sup. Ct. 591; Nalle v. Young, 160 U. S. 624, 16 Sup. Ct. 420; Fitts v. McGhee, 172 U. S. 516, 531, 19 Sup. Ct. 269, 275; Fletcher v. Morey, 2 Story, 567, Fed. Cas. No. 4,864; Alger v. Anderson, 92 Fed. 696, 700, 710.

As to the equity jurisdiction of the United States courts in Louisiana, see Livingston v. Story, 9 Pet. 632; Gaines v. Relf, 15 Pet. 9; McCollum v. Eager, 2 How. 61; Bein v. Heath, 12 How. 168; Walker v. Dreville, 12 Wall. 440; Ridings v. Johnson, 128 U. S. 212, 217, 9 Sup. Ct. 72, 74; New Orleans v. Louisiana Construction Co., 129 U. S. 46, 47, 9 Sup. Ct. 223, 224; Fleitas v. Richardson, 147 U. S. 538, 545, 13 Sup. Ct. 429, 432.

Effect of the Codes.— The federal courts refuse to conform to those provisions of the codes which permit the uniting of legal and equitable causes of action in the same suit: Hurt v. Hollingsworth, 100 U. S. 100, 103, 25 L. ed. 571 (Texas); La Mothe, etc., Co. v. Tube, etc., Co., 15 Blatchf. 436, Fed. Cas. No. 8,033; Kenton, etc., Co. v. McAlpin, 5 Fed. 737, 740; Gudger v. Western, etc., R. Co., 21 Fed. 81, 84; Phelps v. Elliott, 23 Blatchf. 473, 26 Fed. 881, 883; Cherokee Nation v. Southern Kansas Ry., 33 Fed. 900, 914; Union Pac. R. Co. v. United States, 59 Fed. 813, 19 U. S. App. 531, 8 C. C. A. 282; Blalock v. Equitable L. Assur. Soc., 75 Fed. 43, 21 C. C. A. 208 (in action at law for fraud and deceit in obtaining the surrender of an insurance policy, a prayer for equitable relief should be treated as surplus-legislation which deals with subjects belonging to the general system of equity jurisprudence. State laws subtracting from or limiting the scope of equity do not act upon the equitable powers and jurisdiction held by the national

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365. The principle was concisely and clearly stated in Shuford v. Cain, 1 Abb. Pr. 302, 305, by Erskine, J.: "In the courts of many states — Georgia, for example — law and equity are in a greater or less degree blended. This commingling is unknown in the national courts. . . . As courts of equity, they entertain suits in which the relief is sought according to the principles, and in general the practice, of the equity jurisdiction as established in English jurisprudence;" citing Parsons v. Bedford, 3 Pet. 447; Robinson v. Campbell, 3 Wheat. 212; United States v. Howland, 4 Wheat. 108; Pennsylvania v. Wheeling Bridge Co., 13 How. 519. In Thompson v. Railroad Co., 6 Wall. 134, 137, the supreme court distinctly held that the state codes abolishing the distinction between legal and equitable proceedings, and establishing one civil action, etc., do not affect the jurisdiction or methods of the United States courts in such states. In Putnam v. New Albany, 4 Biss. 365, it was held that the Indiana code of procedure giving certain equitable remedies in courts of law does not oust a court of equity of its former jurisdiction to give the same or similar remedies by suit.

age); In re Foley, 76 Fed. 396; Coit v. Sullivan, etc., Co., 84 Fed. 724, 725; Berkey v. Cornell, 90 Fed. 711, 717; First Nat. Bank v. Prager, 91 Fed. 689, 692, 63 U. S. App. 709; or which permit legal relief, such as ejectment, to be based upon an equitable title: Fenn v. Holme, 21 How. 484, 16 L. ed. 199; Hooper v. Scheimer, 23 How. 235, 16 L. ed. 452; Sheirburn v. De Cordova, 24 How. 423, 16 L. ed. 741; Bouldin v. Phelps, 12 Sawy. 315, 30 Fed. 547, 561; Kircher v. Murray, 54 Fed. 617, 626, 60 Fed. 52, 23 U. S. App. 214 (trespass to try title cannot be sustained on the wife's equitable interest in the community property); Stone v. Perkins, 85 Fed. 616, 620 (plaintiff in ejectment can get no support on ground of estoppel; or which permit an equitable defense to be set up in a legal action: Jones v. McMasters, 20 How. 8, 22, 15 L. ed. 805 (Texas); Greer v. Mezes, 24 How. 268, 277, 16 L. ed. 661; Singleton v. Touchard, 1 Black, 345, 17 L. ed. 50; Burnes v. Scott, 117 U. S. 582, 587, 6 Sup. Ct. 868 (reviewing cases); Northern Pac. R. R. v. Paine, 119 U. S. 561, 563, 7 Sup. Ct. 323; Butler v. Young, 1 Flipp. 277, Fed. Cas. No. 2,245; Montijo v. Owen, 14 Blatchf. 325, Fed. Cas. No. 9,722; Lerma v. Stevenson, 40 Fed. 356, 359; Boggs v. Wann, 58 Fed. 681; Wilcox, etc., Co. v. Phœnix Ins. Co., 61 Fed. 199; Davis v. Davis, 72 Fed. 81, 84, 30 U. S. App. 723, 18 C. C. A. 438; Owens v. Heidbreder, 78 Fed. 837, 24 C. C. A. 362 (Texas: trespass to try title); Daniel v. Felt, 100 Fed. 727; Mulqueen v. Schlichter Jute Cordage Co., 108 Fed. 931; Highland Boy Gold Min. Co. v. Strickley, 116 Fed. 852; McManus v. Chollar, (C. C. A.), 128 Fed. 902; Tegarden v. La Marchel, 129 Fed. 487. Thus, a federal court has no power to permit an equitable set-off or counterclaim in an action at law: Scott v. Armstrong, 146 U. S. 499, 512, 13 Sup. Ct. 148, 152; Snyder v. Pharo, 25 Fed. 398, 399, 400; Jewett Car

courts. But while state legislation cannot thus influence the jurisdiction *negatively* so as to narrow it, it may operate affirmatively so as, at least indirectly, to enlarge it. The actual jurisdiction of the United States courts in large measure depends upon the personalty of the litigant parties,— their state citizenship,— and extends to all subject-matters belonging to such tribunals. The primary rights, interests, or estates of the litigant parties, which are dealt with by the exercise of this jurisdiction, must often, therefore, be created by state laws, and not by statutes of Con-

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Co. v. Kirkpatrick Constr. Co., 107 Fed. 622; nor an equitable plea, in an action of ejectment, that the defendant had in good faith and with the plaintiff's knowledge put valuable improvements on the land; Doe v. Roe, 31 Fed. 100; nor a defense of fraud or usury in an action on a judgment: Buller v. Sidell, 43 Fed. 116; Turner v. Hamilton, 88 Fed. 467, 473. In an action on contract, persons claiming labor liens cannot intervene to have them enforced; Gravenburg v. Laws, 100 Fed. 1, 40 C. C. A. 240. Where, in an action for damages, a release was set up, the plaintiff cannot, in the same action, procure the release to be set aside on the ground of fraud or undue influence: Johnson v. Merry Mount Granite Co., 53 Fed. 569; Hill v. Northern Pac. R. Co., 104 Fed. 754, 113 Fed. 914, 51 C. C. A. 544.

In Bennett v. Butterworth, 11 How. 669, 674, 675, 13 L. ed. 859, Taney, C. J., speaks thus of the effect of state statutes abolishing the distinction between legal and equitable actions: "Whatever may be the laws of Texas in this respect, they do not govern the proceedings in the courts of the United States. And although the forms of proceedings and practice in the state courts have been adopted in the district court, yet the adoption of the state practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit. The constitution of the United States in creating and defining the judicial power of the general government establishes this distinction between law and equity; and a party who claims a legal title must proceed at law, and may undoubtedly proceed according to the forms of practice in such cases in the state court. But if the claim is an equitable one, he must proceed according to rules which this court has prescribed (under the authority of the Act of Aug. 23, 1842) regulating proceedings in equity in the courts of the United States."

The provision of the codes requiring suits to be in the name of the "real party in interest" is followed on the law side of the federal courts; consequently there is no necessity for the assignee of a chose in action to sue in equity: Thompson v. Central Ohio R. R. Co., 6 Wall. 134, 18 L. ed. 765; Hayward v. Andrews, 106 U. S. 678, 1 Sup. Ct. 544, 549; Akerly v. Vilas, 3 Biss. 338, Fed. Cas. No. 120; Weed, etc., Co. v. Wicks, 3 Dill. 265, Fed. Cas. No. 17,348; Daniels v. Citizens' Ins. Co., 10 Biss. 120, 5 Fed. 425, 429.

gress. It has accordingly been repeatedly held that while the equitable jurisdiction cannot be narrowed or limited by any state legislative or judicial action, on the other hand, if equitable primary rights, interests, or estates have been enlarged, or if entirely new equitable primary rights or interests have been created, by state laws, such enlarged or new rights will necessarily come within the equity jurisdiction of the national courts, and may be protected, maintained, and enforced in appropriate suits by proper remedies.[1] [a]

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[1] Pratt v. Northam, 5 Mason, 95, 105; Lorman v. Clarke, 2 McLean, 568; Livingston v. Van Ingen, 1 Paine, 45; Canal Co. v. Gordon, 6 Wall. 561, 568; Barber v. Barber, 21 How. 582, 591, 592; Case of Broderick's Will, 21 Wall. 503; Noonan v. Lee, 2 Black, 499, 509; Livingston v. Story, 9 Pet. 632; Clark v. Smith, 13 Pet. 195, 203; Putnam v. New Albany, 4 Biss. 365. In Pratt v. Northam, 5 Mason, 95, Story, J., thus stated the general doctrine: "It has been often decided by the supreme court that the equity jurisdiction of the courts of the United States is not limited or restrained by the local remedies in the different states; that it is the same in all the states, and is the same which is exercised in the land of our ancestors, from whose jurisprudence our own is derived;" citing Robinson v. Campbell, 3 Wheat. 212; United States v. Howland, 4 Wheat. 108, 115. In Lorman v. Clarke, 5 McLean, 568, McLean, J., decided in the circuit court for Michigan, that the "United States courts derive their equity as well as their common-law jurisdiction from the constitution and laws of the United States. In states where there is no chancery court, the equity jurisdiction of the United States courts is the same as in other states. A state cannot enlarge nor

[a] **Jurisdiction not Abridged by State Legislation.**

Injunction.— The jurisdiction, on the ground of avoiding a multiplicity of suits, to enjoin the enforcement of a state statute providing for the fixing of railroad rates, is unaffected by the fact that the statute provides a legal remedy; Smyth v. Ames, 169 U. S. 466, 516, 18 Sup. Ct. 418, 422. The right to enjoin illegal taxation upon some recognized equitable ground, such as cloud upon title to real estate, is not barred by the existence of special statutory remedy: Gregg v. Sanford, 65 Fed. 151, 157, 28 U. S. App. 313; Third Nat. Bank v. Mylen, 76 Fed. 385; Brown v. French, 80 Fed. 166, 169; Taylor v. Louisville & N. R. Co., 88 Fed. 350, 359, 60 U. S. App. 185, 31 C. C. A. 537; Bank of Kentucky v. Stone, 88 Fed. 383, 391. Jurisdiction to enjoin trespass is not ousted by the statutory action of forcible entry and detainer: Pokegama S. P. L. Co. v. Klamath R. L. & I. Co., 96 Fed. 34, 55. The right to an injunction in the federal courts against the enforcement of a state court judgment procured by fraud, accident, or mistake cannot be impaired by a state statute giving a new remedy against the unconscionable judgment in the state courts: National Surety Co. v. State Bank, 120 Fed. 593, (C. C. A.); Breeden v. Lee, 2 Hughes, 488, Fed. Cas.

A very striking illustration of this principle may be seen

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restrict the *jurisdiction* of the United States courts. But the primary rights of parties may be governed by or created by the laws of a state; and the jurisdiction of the United States to adjudicate upon those rights, and the modes whether equitable or legal, are governed by United States laws." In Barber v. Barber, 21 How. 582, 591, 592, Wayne, J., said: "It is no objection to the equity jurisdiction in the courts of the United States, that there is a remedy under the local law, for the equity jurisdiction of the federal courts is the same in all the states, and is not affected by the existence or non-existence of an equity jurisdiction in the state tribunals. It is the same in nature and extent as the jurisdiction of England, whence it is derived;" citing Livingston v. Story, 9 Pet. 632. In Case of Broderick's Will, 21 Wall. 503, the supreme court held that "alterations in the jurisdiction of state courts cannot affect the equitable jurisdiction of the United States courts, *so long as the equitable rights themselves remain;* but an enlargement of equitable rights may be administered by United States courts as well as by the state courts."

No. 1,828; Davenport v. Moore, 74 Fed. 945, 952; Missouri, K. & T. Co. v. Elliott, 56 Fed. 775. It is proper for the federal court in such cases to be guided by a state statute which requires the complainant to show that he is equitably not bound to pay the judgment; Massachusetts Benefit Life Ass'n v. Lohmiller, 74 Fed. 23, 29, 20 C. C. A. 274, 46 U. S. App. 103. Injunction against the levying of an execution on partnership property in which the judgment debtor had no interest will not be denied because the state statute provides a legal remedy; Cropper v. Coburn, 2 Curt. 465, 472, Fed. Cas. No. 3,416.

Cancellation.— A bill by a mortgagee to set aside a fraudulent tax sale of the premises is not affected by a state statute limiting the remedy to the owner; Singer Mfg. Co. v. Yarger, 2 McCrary, 585, 12 Fed. 487, 488. Jurisdiction to cancel a forged instrument on the ground of possible loss of evidence in a future suit thereon cannot be abridged by the existence of state statutes providing for the perpetuation of testimony; Schmidt v. West, 104 Fed. 272. See also United States Life Ins. Co. v. Cable, 98 Fed. 761, 39 C. C. A. 756. Statutory remedy by motion to vacate an award of arbitrators does not deprive the federal courts of jurisdiction to set aside the award and enjoin actions thereon; Hartford Fire Ins. Co. v. Bonner Mercantile Co., 44 Fed. 151, 11 L. R. A. 623.

Partition.—The general jurisdiction of the federal courts as courts of equity cannot be limited by a state statute confining the remedy to complainants in possession; Lamb v. Starr, Deady, 350, Fed. Cas. No. 8,021.

Specific Performance of a contract to convey lands may be enforced against a municipality, although there is an adequate remedy by mandamus in the state courts; Provisional Municipality of Pensacola v. Lehman, 57 Fed. 324, 331, 13 U. S. App. 411. And specific performance by a municipality of an obligation in the nature of an implied trust to deliver certain bonds may be compelled, notwithstanding that the state provides a special statutory remedy; Kimball v. Mobile, 3 Woods, 565, Fed. Cas. No. 7,774.

Foreclosure of Mortgages.— The existence of a state statutory remedy in the power of the United States circuit courts to entertain

does not oust the federal equity jurisdiction: Benjamin v. Cavaroc, 2 Woods, 172, Fed. Cas. No. 1,300; Ray v. Tatum, 72 Fed. 112, 30 U. S. App. 635 (deed absolute in form); H. B. Claflin Co. v. Furtick, 119 Fed. 429 (chattel mortgage). The jurisdiction is not affected by the fact that the mortgagor has made a statutory general assignment for the benefit of creditors, which would have the effect of limiting a citizen of the same state to enforcing the mortgage in the court which was administering the property; Edwards v. Hill, 59 Fed. 723, 19 U. S. App. 493.

Equitable Liens may be enforced in the federal courts, although no remedy is provided for the enforcement of such liens by the state jurisprudence in the state courts; Burdon Cent. Sugar Refin. Co. v. Ferris Sugar Mfg. Co., 78 Fed. 417, 422.

Creditor's Bills will lie in the federal courts, in accordance with the general principles of equity, notwithstanding that the judgment creditor may have a legal remedy available in the courts of the state. See United States v. Howland, 4 Wheat. 108, 4 L. ed. 526 (a leading case; legal remedy in state courts against the debtor of complainants' debtor); Byrd v. Badger, 1 McAll. 445, Fed. Cas. No. 2,266 (proceedings supplementary to execution, being equitable in their nature, cannot be pursued on the law side of the court); Orendorf v. Budlong, 12 Fed. 24 (setting aside fraudulent conveyance); Fleisher v. Greenwald, 20 Fed. 547 (setting aside fraudulent deed of assignment); First Nat. Bank v. Steinway, 77 Fed. 661; Mississippi Mills v. Cohn, 150 U. S. 202, 14 Sup. Ct. 75.

Miscellaneous.— See United States v. Parrott, 1 McAll. 288, Fed. Cas. No. 15,998 (injunction against waste); Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co., 68 Fed. 19, 46 U. S. App. 530 (accounting); General Electric Co. v. West Asheville Imp. Co., 73 Fed. 386 (winding up affairs of defunct corporation); Sowles v. First Nat. Bank, 100 Fed. 552 (establishing a set-off); Barrett v. Twin City Power Co., 118 Fed. 861.

Enlargement of Jurisdiction as Result of State Legislation.— That an "enlargement of equitable rights" effected by state legislation may be administered by the federal courts is a familiar doctrine. "Although a state law cannot give jurisdiction to any federal court, yet it may give a substantial right of such a character that, when there is no impediment arising from the residence of the parties, the right may be enforced in the proper federal tribunal, whether it be a court of equity, admiralty, or of common law;" Reynolds v. Crawfordsville Bank, 112 U. S. 410, 5 Sup. Ct. 216. This principle, however, is subject to important limitations produced by section 723 of the Revised Statutes, and by the seventh amendment of the Constitution of the United States. The state law "cannot control the proceedings in the federal courts, so as to do away with the force of the law of congress declaring that 'suits in equity shall not be sustained in either of the courts of the United States, in any case where a plain, adequate, and complete remedy may be had at law,' or the constitutional right of parties in actions at law to a trial by a jury;" Whitehead v. Shattuck, 138 U. S. 146, 11 Sup. Ct. 277, by Field, J. "All actions which seek to recover specific property, real or personal, with or without damages for its detention, or a money judga suit for the general administration and settlement of a

ment for breach of a simple contract, or as damages for injury to person or property, are legal actions, and can be brought in the federal courts only on their law side. Demands of this kind do not lose their character as claims cognizable in the courts of the United States only on their law side, because in some state courts, by virtue of state legislation, equitable relief in aid of the demand at law may be sought in the same action. Such blending of remedies is not permissible in the courts of the United States;" Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712, 714, by Field, J.

The following cases, among many others, illustrate this principle: The federal courts will follow a state statute extending the right to an injunction against illegal taxation; no constitutional right to a jury trial is infringed by such remedy; Cummings v. National Bank, 101 U. S. 157, 25 L. ed. 904; Lindsay v. First Nat. Bank, 156 U. S. 485, 493, 15 Sup. Ct. 472, 475; Grether v. Wright, 75 Fed. 742, 746, 43 U. S. App. 770; Lander v. Mercantile Nat. Bank, 118 Fed. 785, 791, (C. C. A.); dispensing with an allegation or proof of defendant's insolvency in an action to enjoin the cutting of timber; Lanier v. Allison, 31 Fed. 100, 102; extending the remedy of interpleader to cases where the conflicting claims are independent of each other; Wells, Fargo & Co. v. Miner, 25 Fed. 533; allowing partition of joint possessory rights to a mining claim; Aspen Mining & S. Co. v. Rucker, 28 Fed. 220; *contra*, Strettell v. Ballou, 3 McCrary, 46, 9 Fed. 256; declaring a preferential assignment to be a trust for the benefit of all the creditors of the assignor; George T. Smith M. P. Co. v. McGroarty, 136 U. S. 240, 10 Sup. Ct. 1019; dispensing with the requirement that the complainant must do equity, in a suit to set aside a usurious contract; Missouri, K. & T. Trust Co. v. Krumseig, 172 U. S. 359, 361, 19 Sup. Ct. 179, 182, 183, affirming 77 Fed. 41, 40 U. S. App. 620; empowering courts of equity to pass the title to real estate by decree, without any act on the part of the respondent; A. & W. Sprague Mfg. Co. v. Hoyt, 29 Fed. 421, 428; Single v. Scott Paper Mfg. Co., 55 Fed. 553, 556; Deck v. Whitman, 96 Fed. 873, reviewing many cases; authorizing the appointment of a receiver of a corporation on the sole ground of its insolvency, at the suit of mortgage creditors; United States Shipbuilding Co. v. Conklin, 126 Fed. 132, (C. C. A.); authorizing the winding up of an insolvent corporation at the suit of a stockholder; Jacobs v. Mexican Sugar Co., 130 Fed. 589.

It is often a question of doubt whether the new right or remedy is legal or equitable in its nature. "Whenever a new right is granted by statute, or a new remedy for violation of an old right, or whenever such rights and remedies are dependent on state statutes or acts of Congress, the jurisdiction of such cases, as between the law side and the equity side of the federal courts, must be determined by the essential character of the case; and unless it comes within some of the recognized heads of equitable jurisdiction, it must be held to belong to the other." Van Norden v. Morton, 99 U. S. 378, 380, 25 L. ed. 455; Cherokee Nation v. Southern Kan. R'y Co., 135 U. S. 641, 651, 10 Sup. Ct. 965, 969, 33 Fed. 900, 914; Thomas v. American Freehold, etc., Co., 47 Fed. 550, 12 decedent's personal estate, when the citizenship of the

L. R. A. 686; Cummings v. National Bank, 101 U. S. 157, 25 L. ed. 904; Robinson v. Campbell, 3 Wheat. 212, 223, 4 L. ed. 372.

In the following cases it was held that the new right created by statute should be asserted on the equity side of the federal court: When the relief prayed for was in the nature of a decree enjoining the collection of taxes; Lindsay v. First Nat. Bank, 156 U. S. 485, 493, 15 Sup. Ct. 472, 475; statutory proceedings for partition which, by the state practice, were triable without a jury; Klever v. Seawall, 65 Fed. 393, 22 U. S. App. 715, 12 C. C. A. 661; proceedings without a jury, to enforce the right of an occupying claimant of land to compensation for improvements made thereon in good faith; Bank of Hamilton v. Dudley's Heirs, 2 Pet. 492; Griswold v. Bragg, 18 Blatchf. 204, 48 Fed. 520; proceedings to enforce a mechanics' or laborers' lien, where the state statute gives an action at law for the purpose; Sheffield Furnace Co. v. Witherow, 149 U. S. 574, 579, 13 Sup. Ct. 936, 939; De La Vergne Refrig. Mach. Co. v. Montgomery Brewing Co., 46 Fed. 829; Idaho, etc., Land Imp. Co. v. Bradbury, 132 U. S. 509, 515, 10 Sup. Ct. 179; or provides no means for enforcing it; Gilchrist v. Helena H. S. & S. R. Co., 58 Fed. 708, 711, 712; proceedings to determine and enforce other statutory liens upon land; Alexander v. Mortgage Co. of Scotland, 47 Fed. 131, 134; Mortgage Security Co. v. Gay, 33 Fed. 636; Thomas v. American Freehold L. & M. Co., 47 Fed. 550, 553, 12 L. R. A. 681; proceedings to enjoin the sale of land under an execution against a third person (Georgia "claim law"); Hall v. Yahoka R. Min. Co., 1 Woods, 547, Fed. Cas. No. 5,955. "Proceedings supplementary to execution" cannot be substituted for a creditor's bill; Byrd v. Badger, Fed. Cas. No. 2,266; Regina Music Box Co. v. F. G. Otto & Son, 124 Fed. 747; unless they are founded on a common-law judgment, in which case the state statute may be followed, by the express authorization of Act July 1, 1872, chap. 255, § 6; Re Boyd, 105 U. S. 647, 26 L. ed. 1200.

In the following cases the statutory remedy is held to be legal in its nature: Special proceedings by an administrator for leave to sell lands to pay the debts of a decedent, although held by the state court to be essentially equitable, must be placed upon the law docket of the federal court, since the case does not come within any of the recognized heads of equity jurisdiction; Elliott v. Shuler, 50 Fed. 454; a state statute conferring equity jurisdiction in cases of accounting where "the nature of the account is such that it cannot be conveniently and properly adjusted and settled in a court of law" does not extend the jurisdiction of the federal courts; Hunton v. Equitable Life Assur. Soc., 45 Fed. 661; and a bill cannot be entertained for partition where the complainant has been disseized, and the lands are held adversely by the defendants, although such a bill is permitted by the state practice; Sanders v. Devereux, 60 Fed. 311, 315, 19 U. S. App. 630; Frey v. Willoughby, 63 Fed. 865, 27 U. S. App. 417, 11 C. C. A. 463; or when the complainant's title is disputed; American Ass'n v. Eastern Kentucky Land Co., 68 Fed. 721. Garnishment proceedings cannot be entertained on the equity side of the federal court; United States v. Swan, 65 Fed. 647, parties is such as to confer the jurisdiction. In very many

652, 31 U. S. App. 112. Where a new liability, and a legal remedy to enforce the same, are created by statute, that remedy, and that alone, must be enforced; so held of the statutory liability of stockholders for the debts of the corporation, in Fourth Nat. Bank v. Francklyn, 120 U. S. 755, 7 Sup. Ct. 757, 762; National Park Bank v. Peavey, 64 Fed. 912; First National Bank v. Peavey, 69 Fed. 455; and see Alderson v. Dole, 74 Fed. 29, 33 U. S. App. 460, 20 C. C. A. 280.

Enlargement of Jurisdiction; Statutory Suit to Quiet Title.— A frequent application of these principles is found in the federal jurisdiction over statutory suits to quiet title. In the absence of statute, an owner of land can protect his title in equity only by a bill of peace or by a bill *quia timet* to remove a cloud upon the title. A bill of peace properly lies against an individual reiterating an unsuccessful claim to real property only where the plaintiff is in possession and his right has been successfully maintained at law. The equity arises from the protracted litigation for the possession which the common-law action of ejectment permits. A bill *quia timet* to remove cloud upon title differs from a bill of peace in that it does not seek so much to put an end to vexatious litigation as to prevent future litigation by removing existing causes of controversy as to its title. To maintain a suit of this character it is generally necessary that the plaintiff be in possession, and, except where the defendants are numerous, that his title be established at law or founded on undisputed evidence or long-continued possession. The statutes in various states authorize a suit in either of these classes of cases without reference to any previous judicial determination of the validity of the plaintiff's right, and, in some instances, without reference to his possession.

Where the statute limits the right to parties in possession, the federal courts will take jurisdiction without question. The point arose in the early case of Clark v. Smith, 13 Pet. 195, 203, where the right was claimed under a statute of Kentucky. Catron, J., said: "Kentucky has the undoubted power to regulate and protect individual rights to her soil, and to declare what shall form a cloud on titles; and having so declared, the courts of the United States, by removing such clouds, are only applying an old practice to a new equity created by the legislature, having its origin in the peculiar condition of the country." In speaking of such a statute, the court, in Central Pac. R. R. Co. v. Dyer, 1 Sawy. 649, Fed. Cas. No. 2,552, said: "It dispenses with the necessity of the previous establishment of the right of the plaintiff by repeated judgments in his favor in actions at law. To that extent it confers upon the possessor of real property a new right, one which enables him, without the delay of previous proceedings at law, to draw to himself all outstanding inferior claims. That right the national courts will enforce in the same manner in which they will enforce other equitable rights of parties." See also Chapman v. Brewer, 114 U. S. 171, 5 Sup. Ct. 799, 805; Bardon v. Land & River Imp. Co., 157 U. S. 327, 330, 15 Sup. Ct. 650, 651; Wickliffe v. Owens, 17 How. 47, 51; Provident, etc., Trust Co. v. Mills, 91 Fed. 435; Book v. Justice, 58 Fed. 830; Bayerque v. Cohen, 1 McAll. 117, Fed. Cas. No. 1,134; Law-of the states the whole subject of administration has been

rence v. Bowman, 1 McAll. 423, Fed. Cas. No. 8,134; Prentice v. Duluth, etc., Co., 58 Fed. 437, 442, 7 C. C. A. 293, 19 U. S. App. 100; Gillis v. Downey, 85 Fed. 483, 56 U. S. App. 577; Harmer v. Gwynne, 5 McLean, 317, Fed. Cas. No. 6,075. For a review of the supreme court decisions up to 1894, see Wehrman v. Conklin, 155 U. S. 314, 15 Sup. Ct. 132. An actual possession of part of the premises and a constructive possession of the rest is sufficient; Roberts v. Northern Pac. R. Co., 158 U. S. 1, 30, 15 Sup. Ct. 756, 766. Where the statute allows the suit by a party either in or out of possession, and the complainant is, as a matter of fact, in possession, the bill may be maintained in the federal court: Connor v. Alligator Lumber Co., 98 Fed. 155; Langstraat v. Nelson, 40 Fed. 783; Field v. Barber Asphalt Co., 117 Fed. 925; Hanley v. Beatty, 117 Fed. 59. It is immaterial that there may be an action of ejectment pending against the complainant: Langstraat v. Nelson, 40 Fed. 783.

Where the statute allows a suit by a party out of possession, a federal court will not as a general rule enforce it if the complainant is, as a matter of fact, out of possession, and defendant is in possession. It is provided by Rev. Stats., § 723, that federal equity courts shall not have jurisdiction where a plain, complete, and adequate remedy may be had at law, and the seventh amendment to the constitution of the United States secures the right of jury trial in all actions at law where the value in controversy exceeds twenty dollars. When the plaintiff is out of and the defendant in possession, the remedy by ejectment is said to be adequate, and there must be a jury trial if desired. "The right which in this case the plaintiff wishes to assert is his title to certain property; the remedy which he wishes to obtain is its possession and enjoyment; and in a contest over the title both parties have a constitutional right to call for a jury;" Whitehead v. Shattuck, 138 U. S. 146, 11 Sup. Ct. 276, 277. See also Davidson v. Calkins, 92 Fed. 230; Gordon v. Jackson, 72 Fed. 86; Cosmos Exploration Co. v. Gray Eagle Oil Co., 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230; U. S. Min. Co. v. Lawson, 115 Fed. 1005; Cal. Oil & Gas Co. v. Miller, 96 Fed. 12; Adoue v. Strahan, 97 Fed. 961; Gombert v. Lyon, 80 Fed. 305; Boston & Mont. C. C. & S. M. Co. v. Montana Ore P. Co., 188 U. S. 632, 23 Sup. Ct. 434; Morrison v. Marker, (C. C. A.), 93 Fed. 692, 695 (suit not maintainable by purchaser at execution sale, who is not in possession, to set aside prior conveyance as in fraud of creditors); Giberson v. Cook, 124 Fed. 986. The same result was reached in United States v. Wilson, 118 U. S. 86, 6 Sup. Ct. 993, under a provision of the Tennessee code giving the chancery court jurisdiction over an action of ejectment. The practice in such cases is not to dismiss but to remand to the state court; Gombert v. Lyon, 80 Fed. 305. In Greeley v. Lowe, 155 U. S. 58, 75, 15 Sup. Ct. 24, 28, it is said that the federal courts will enforce a state statute allowing a party in or out of possession to sue to quiet title, provided it does not infringe the constitutional right to a trial by jury. In Southern Pac. R. Co. v. Goodrich, 57 Fed. 879, it was held that the plaintiff must allege possession in himself or deny possession in defendant. It is not sufficient that it does not appear who is in possession. But taken from the equity tribunals, and conferred upon pro-

see Union Pac. R. Co. v. Meier, 28 Fed. 9. In Morse v. Steinbach, 127 U. S. 70, 8 Sup. Ct. 1067, 1072, it was held that a failure to allege and prove possession is not fatal where the statute allows a party out of possession to maintain the bill. Likewise, in Reynolds v. First Nat. Bank, 112 U. S. 410, 5 Sup. Ct. 212, 216, it was held that a federal court will allow a party either in or out of possession to maintain the suit. Apparently the defendant was in possession, but the relief was allowed. In both of these cases, Holland v. Challen, 110 U. S. 15, 3 Sup. Ct. 495, was relied upon. As is shown in Whitehead v. Shattuck, 138 U. S. 146, 11 Sup. Ct. 276, the case of Holland v. Challen does not go to this extent. It applies simply where both plaintiff and defendant are out of possession. Hence both must be considered as overruled, so far as they are contrary to the principles laid down above.

Although a party be out of possession, if equity alone can award the entire relief sought, and the right to possession arises only incidentally, the bill will be retained for complete relief and the right to possession determined. Thus, under the Burnt Records Act of Illinois, a federal court has taken jurisdiction of a bill by a party out of possession to restore a destroyed record of title, and incidentally has decided the question of possession. Gormley v. Clark, 134 U. S. 338, 348, 10 Sup. Ct. 554. Likewise, the bill has been retained when the plaintiff has sought to redeem from a fraudulent foreclosure; Hudson v. Randolph, 66 Fed. 216, 23 U. S. App. 681, and to set aside fraudulent proceedings under which deeds were made; Sayers v. Burkhardt, 85 Fed. 246, 42 U. S. App. 742.

Where neither party is in possession and the land is unoccupied, the case is different. In such a case there can be no controversy at law respecting the title or right of possession, for an action of ejectment will lie only against a party in possession. Accordingly the federal courts will take jurisdiction and enforce the equitable right. Holland v. Challen, 110 U. S. 16, 3 Sup. Ct. 495. The reasons are well stated in a recent case: "As it appears that the defendant was not in possession of the lands, and that the plaintiff has no adequate remedy at law, and that the defendant is not deprived of the right of a trial by jury, there is no valid objection to the jurisdiction of the United States circuit court;" Southern Pine Co. v. Hall, 105 Fed. 84, 44 C. C. A. 363. See also Dick v. Foraker, 155 U. S. 404, 415, 15 Sup. Ct. 124, 129; Roberts v. Northern Pac. R. R. Co., 158 U. S. 1, 30, 15 Sup. Ct. 756, 766; Davidson v. Calkins, 92 Fed. 230; Gordon v. Jackson, 72 Fed. 86; U. S. Min. Co. v. Lawson, 115 Fed. 1005; Grand Rapids, etc., R. Co. v. Sparrow, 36 Fed. 210, 211, 1 L. R. A. 482; Harding v. Guice, 80 Fed. 162, 42 U. S. App. 411. In Blythe v. Hinckley, 84 Fed. 246, 256, it was held that the bill cannot be maintained when a public administrator is in possession, although both the parties to the suit are out of possession. Of course, where the statute expressly authorizes a suit when the land is vacant, the bill will be sustained; Bigelow v. Chatterton, 51 Fed. 614, 10 U. S. App. 267, 2 C. C. A. 402.

The mere fact that the decisions of the state courts warrant the relief does not authorize the federal courts to grant it. Thus, in Peck v. Ayers bate courts acting under special statutory authority. This

& Lord Tie Co., 116 Fed. 273, "It is not claimed that there is any statute in Tennessee which enlarges the principles of equity in this regard, but it is claimed that the decisions of the supreme court of the state respecting the right to file a bill to quiet title have established a different rule from that generally prevailing in the courts of the United States, and hold that possession by the plaintiff is not necessary. But this is a mere variation of decision in respect of a principle of general equity, and we are not aware of any precedent for holding that the rule so established can be admitted to change the doctrines of equity as recognized and applied in the federal courts." But see, *contra*, Lamb v. Farrell, 21 Fed. 5, 8.

Statutory Creditors' Suits by Simple Contract Creditors.— In some of the states statutes have been passed allowing simple contract creditors to maintain creditors' bills without the establishment of their claims at law. The supreme court has declined to enforce these statutes. In the leading case of Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712, Justice Field said: "All actions which seek to recover specific property, real or personal, with or without damages for its detention, or a money judgment for breach of a simple contract, or as damages for injury to person or property, are legal actions, and can be brought in the federal courts only on their law side. Demands of this kind do not lose their character as claims cognizable in the courts of the United States only on their law side, because in some state courts, by virtue of state legislation, equitable relief in aid of the demand at law may be sought in the same action. Such blending of remedies is not permissible in the courts of the United States." Following this case, Mr. Chief Justice Fuller, in Cates v. Allen, 149 U. S. 457, 13 Sup. Ct. 883, after pointing out that the right to maintain a creditor's bill is based upon a lien upon the property, said: "The fact that section 1845 aims to create a lien by the filing of the bill does not affect the question, for, in order to invoke equity interposition in the United States courts, the lien must exist at the time the bill is filed, and form its basis; and to allow a lien resulting from the issue of process to constitute such ground would be to permit state legislation to withdraw all actions at law from the one court to the other, and unite legal and equitable claims in the same action, which cannot be allowed in the practice of the courts of the United States, in which the distinction between law and equity is matter of substance, and not merely of form and procedure." To the same effect, see Smith v. Fort Scott, etc., R. R. Co., 99 U. S. 401; Mississippi Mills v. Cohn, 150 U. S. 202, 14 Sup. Ct. 76; Hollins v. Brierfield, etc., Iron Co., 150 U. S. 371, 379, 14 Sup. Ct. 127, 128; Peacock, Hunt & West Co. v. Williams, 110 Fed. 917; United States v. Ingate, 48 Fed. 251; Atlanta, etc., R. Co. v. Western R. Co., 50 Fed. 790, 794, 2 U. S. App. 227, 1 C. C. A. 776; England v. Russell, 71 Fed. 818, 821, 824; Childs v. N. B. Carlstein Co., 76 Fed. 86, 92, 95; Tompkins Co. v. Catawba Mills, 82 Fed. 780, 783; First Nat. Bank v. Prager, 91 Fed. 689, 692, 63 U. S. App. 709; Morrow Shoe Co. v. New England Shoe Co., 60 Fed. 341, 18 U. S. App. 616, 8 C. C. A. 652, 24 legislation, it is held, has not affected the original equitable jurisdiction of the national courts sitting in such states,

L. R. A. 425; Jacobs v. Mexican Sugar Co., 130 Fed. 589. Likewise, a federal court has no jurisdiction over a proceeding for equitable attachment, although allowed under the state law. Hall v. Gambril, 92 Fed. 321, 63 U. S. App. 751, 34 C. C. A. 190.

In Cates v. Allen, however, there is a vigorous dissenting opinion by Mr. Justice Brown, which seems to have much reason on its side (13 Sup. Ct. 977). He held that the statute creates a substantial right which the federal courts should enforce. "In this case the court of equity proceeds to establish the debt, not as a personal judgment against the debtor, which may be sued upon in any other court, but for a purpose special to that case, in order to reach property which has been fraudulently conveyed, and to appropriate it to the payment of the debt. If the object of the proceeding were the establishment of a debt for all purposes, which should become *res adjudicata* in other proceedings, and be suable elsewhere as an established claim against the debtor, or were not a mere incident to the chancery jurisdiction, I can understand why the constitutional provision might apply. But in this case I see no more reason for requiring a common-law action to establish the debt than in case of the foreclosure of a mortgage, or the enforcement of a mechanic's lien, where proof of an existing debt is equally necessary to warrant a decree." And referring to the stand taken by the majority, he said: "The logical consequence of the position assumed by the court in this case is that it is compelled to remand the case for a reason entirely outside the removal acts, and thus to deny to the removing party the benefit of the act." "I have never known of a federal court admitting its inability to do justice between the parties, and remanding the case upon that ground." For earlier cases, sustaining the right to maintain the bill, see Flash v. Wilkerson, 22 Fed. 689, 691; Johnston v. Straus, 4 Hughes, 636, 26 Fed. 57, 67; Buford v. Holley, 28 Fed. 680.

The effect of the supreme court decisions is to compel a nonresident creditor to resort to the state courts or else be placed at a disadvantage as compared with the resident creditors. Consequently some of the federal courts are inclined to confine the decisions strictly, and upon any possible ground of distinction to allow the bill. Thus, in Darragh v. H. Wetter Mfg. Co., 78 Fed. 7, 23 C. C. A. 609, a bill by a simple contract creditor to wind up a corporation was allowed, under a statute of Arkansas. In the well-considered case of Jones v. Mutual Fidelity Co., 123 Fed. 506 (Bradford, D. J.), jurisdiction was entertained, at the suit of simple contract creditors, of a bill under the Delaware statute for the appointment of a receiver to administer the affairs of an insolvent corporation. It was held (p. 524), that the statute "created a substantial right of a purely equitable nature, and a purely equitable procedure to enforce it," and that the pursuit of and exhaustion of the legal remedy by an application of the assets of the insolvent corporation to final process at law would be destructive of the right conferred by the statute. The decisions in Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712, nor interfered with their power to entertain a suit for administration in a proper case.[2 b]

§ 294. **Third Principle: Extent.**— The third principle relates to the extent of the jurisdiction. While the equitable

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[2] Pratt v. Northam, 5 Mason, 95, 105, per Story, J.

35 L. ed. 358, and Cates v. Allen, 149 U. S. 451, 13 Sup. Ct. 977, 37 L. ed. 804, and *dictum* in Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. ed. 1113, were interpreted as referring only to cases where the complainants pursue, *ab initio*, a purely equitable remedy for purpose merely of removing "some obstacle or difficulty in the way of the due and beneficial execution of the final process." In Hudson v. Wood, 119 Fed. 764, it was held that a creditor's bill brought by a simple contract creditor may be retained for a discovery and for the establishment of "the right to an equitable lien ('equitable levy,' as it is sometimes called) upon any indebtedness of his to the judgment debtors, such lien to become effective and to be enforced when such indebtedness, if denied, shall have been ascertained in an action at law." This rule at least has the merit of protecting the party who resorts to the federal courts from being postponed to those who resort to the state courts. By the laws of South Dakota, a fraudulent assignment acts as a trust for the benefit of all the creditors. Under this legislation a federal court has allowed a simple contract creditor to sue to enforce the trust: Wyman v. Mathews, 53 Fed. 678.

Where a judgment would be useless and the debt has been admitted, the bill has been sustained. Thus, in Talley v. Curtain, 54 Fed. 43, 8 U. S. App. 347, the debtor made a general assignment, in which complainant's debt was recognized. It was held that complainant, although he had not established his claim at law, might maintain a bill to set aside the assignment.

(b) Jurisdiction over Administration of Estates of Decedents.— This original jurisdiction of courts of equity in the administration of estates has been exercised by the United States courts in a very great number of cases. "As a part of the ancient and original jurisdiction of courts of equity, it is vested, by the constitution of the United States, and the laws of Congress in pursuance thereof, in the federal courts, to be administered by the circuit courts in controversies arising between citizens of different states. It is the familiar and well-settled doctrine of this court that this jurisdiction is independent of that conferred by the states upon their own courts, and cannot be affected by any legislation except that of the United States. . . . The only qualification in the application of this principle is that the courts of the United States, in the exercise of their jurisdiction over the parties, cannot seize or control property while in the custody of a court of the state." Borer v. Chapman, 119 U. S. 587, 600, 7 S. Ct. 342, 348. See, in addition to the cases cited *infra*, in this note, Green's Adm'r v. Creighton, 23 How. 90, 105, 16 L. ed. 419, 423; Payne v. Hook, 7 Wall. 425, 430, 19 L. ed. 262 (a leading case); Hess v. Reynolds, 113 U. S. 78, 5 Sup. Ct. 378; Arrowsmith v. Gleason, 129 U. S. 86, 98, 100, 9 Sup. Ct. 237, 241; Clark v.

jurisdiction of the national courts is derived wholly from the United States constitution and statutes, it is identical or equivalent in extent with that possessed by the English

Bever, 139 U. S. 96, 103, 11 Sup. Ct. 468, 470; Johnson v. Powers, 139 U. S. 156, 157, 11 Sup. Ct. 525; Laurence v. Nelson, 143 U. S. 224, 12 Sup. Ct. 440, 443; Hayes v. Pratt, 147 U. S. 557, 570, 13 Sup. Ct. 503, 507; Ball v. Tompkins, 41 Fed. 486, 489 (a very clear statement); Semmes v. Whitney, 50 Fed. 666; Comstock v. Herron, 55 Fed. 803, 811, 6 U. S. App. 626; Martin v. Fort, 83 Fed. 19, 23, 54 U. S. App. 325; Davis v. Davis, 89 Fed. 532, 537; Hampton Lumber Co. v. Ward, 95 Fed. 3; Hale v. Tyler, 115 Fed. 833 (a most instructive opinion).

The jurisdiction does not, however, extend to matters which were within the exclusive cognizance of the English ecclesiastical courts, such as the probate of wills, the appointment of administrators, or the confirmation of executors. Ball v. Tompkins, 41 Fed. 489; Oakley v. Taylor, 64 Fed. 245, 246.

The jurisdiction has been exercised in the following cases, among many others: Suits by creditors of the decedent to establish their claims: Hagan v. Walker, 14 How. 29, 33; Green's Adm'rs v. Creighton, 23 How. 90; Hess v. Reynolds, 113 U. S. 78, 5 Sup. Ct. 378; Borer v. Chapman, 119 U. S. 587, 600, 7 Sup. Ct. 342, 348, 1 McCrary, 50, 51, 1 Fed. 274; Clark v. Bever, 139 U. S. 96, 103, 11 Sup. Ct. 468, 470 (to enforce deceased's liability as stockholder); Covington v. Burnes, 1 Dill. 17, Fed. Cas. No. 3,291; Fiske v. Gould, 11 Biss. 297, 12 Fed. 372, 374 (to reach partnership assets in hands of representatives); Terry v. Bank of Cape Fear, 20 Fed. 773, 775; Wickham v. Hull, 60 Fed. 326, 330 (to establish claim against estate in possession of state probate court, but not to enforce the same); Hale v. Tyler, 115 Fed. 833 (to set aside a fraudulent conveyance by decedent).

The jurisdiction of the federal court in such cases cannot be ousted or impaired by any provision of a state law requiring creditors to appear before a state court and present their claims within a limited time: Chewett v. Moran, 17 Fed. 820 (bill to subject real estate in the hands of heirs to the payment of debts, after administration has been closed); Johnston v. Roe, 1 McCrary, 162, 1 Fed. 692 (same); Hartman v. Fishbeck, 18 Fed. 295, and note; Heaton v. Thatcher, 59 Fed. 731.

See, to the effect that jurisdiction will not be taken to establish a purely legal demand in equity on the mere ground that the demand is against the estate of a deceased person, Walker v. Brown, 63 Fed. 204, 208–212; Bedford Quarries Co. v. Thomlinson, 95 Fed. 208, 36 C. C. A. 272; Thiel Detective Service Co. v. McClure, 130 Fed. 55. So, the petition of an illegitimate child to establish his statutory right to share in the estate presents a legal, not an equitable, issue; In re Foley, 76 Fed. 390.

Suit for recovery of a legacy: Mayor v. Foulkrod, 4 Wash. C. C. 356, Fed. Cas. No. 9,341 (though action at law provided by state statute); Pulliam v. Pulliam, 10 Fed. 23, 30 (although executor's accounts have been settled in state court); Brendel v. Charch, 82 Fed. 262, 263. Suit to set aside a fraudulent distribution of the estate: Sullivan v. Andoe, 4 Hughes, 299, 6 Fed. 641, high *court* of chancery at the time of the Revolution. The *judicial* functions and powers of the English court of chancery are held to have been conferred *en masse* upon the

650; as, where a distributee is fraudulently induced to accept less than his share of the estate; Payne v. Hook, 7 Wall. 430; Costello v. Costello, 4 McCrary, 547, 14 Fed. 207, 209 (suit to remove cloud from title to personal property); Cowen v. Adams, 78 Fed. 536, 543, 47 U. S. App. 676; or where an administrator, by fraud and connivance, gives an unwarranted preference to the claims of certain creditors to the exclusion of others; Dodd v. Ghiselin, 27 Fed. 405, 410, by Brewer, J.; or to surcharge and correct a settlement of accounts by administrators which has been confirmed by decree of the probate court; Bertha L. & M. Co. v. Vaughan, 88 Fed. 566, 571. Suit against an executor *de son tort*, for accounting and distribution, where there has been no administration upon the estate; Rich v. Bray, 37 Fed. 273, 2 L. R. A. 225. Suit for the construction of a probated will: Toms v. Owen, 52 Fed. 417; Colton v. Colton, 127 U. S. 301, 308, 8 Sup. Ct. 1164; Wood v. Paine, 66 Fed. 807. Suit by ward against guardian, setting aside orders of probate court: Hull v. Dills, 19 Fed. 658; Arrowsmith v. Gleason, 129 U. S. 86, 98, 100, 9 Sup. Ct. 237, 241.

No Original Probate Jurisdiction.—"It has never been a part of the function of courts of law or equity, by a proceeding having that especial purpose in view, either to establish or reject wills. This jurisdiction was committed exclusively to the ecclesiastical courts in England, for which are substituted, with a jurisdiction extending to probate of wills of real estate, by the several states of the Union, courts of probate, variously styled probate, surrogate, or orphans' courts, not, however, exercising common-law or chancery cognizance; and these courts have always enjoyed this jurisdiction exclusive of either courts of common law or equity, tending a field of business from which other courts were excluded by the very nature of their organization and procedure." Oakley v. Taylor, 64 Fed. 246. The United States courts have no jurisdiction, by virtue of their general equity powers, to establish a will: In re Frazer, Fed. Cas. No. 5,068; In re Cilley, 58 Fed. 982, 984, 985, 989; Copeland v. Bruning, 72 Fed. 5, 8; In re Aspinwall's Estate, 83 Fed. 851; Cilley v. Patten, 62 Fed. 498; nor to set aside a will or the probate thereof: In re Broderick's Will, 21 Wall. 503, 22 L. ed. 599; Fouverne v. New Orleans, 18 How. 470, 15 L. ed. 399; Ellis v. Davis, 109 U. S. 498, 3 Sup. Ct. 327, 335, affirming 4 Woods, 11, Fed. Cas. No. 4,402; Oakley v. Taylor, 64 Fed. 245; Carran v. O'Calligan, (C. C. A.), 125 Fed. 657, reviewing the cases; *post*, § 913; *contra*, O'Callaghan v. O'Brien, 116 Fed. 934; nor to set aside letters of administration: Simmons v. Saul, 138 U. S. 439, 454, 460, 11 Sup. Ct. 369, 376.

When, however, jurisdiction to set aside wills or the probate thereof has been vested by state statute in courts of equity, the federal court of equity, sitting in the state where such statute exists, will also entertain such jurisdiction in a case between proper parties: Gaines v. Fuentes, 92 U. S. 10, 21, 23 L. ed. 528; Williams v. Crabb, 117 Fed. 193, 59 L. R. A. 425, reviewing the authorities; Richard-national judiciary; but not the peculiar administrative functions held by the chancellor as representative of the crown in its character of *parens patriæ*. These latter func-

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son v. Green, 61 Fed. 423, 429, 15 U. S. App. 488, 9 C. C. A. 565, 159 U. S. 264, 15 Sup. Ct. 1042; but see Reed v. Reed, 31 Fed. 49, 53; Oakley v. Taylor, 64 Fed. 245 (holding that the statute in question provided merely a remedy by appeal, which could not be enforced by a federal court); Sawyer v. White, 122 Fed. 223 (statutory remedy of a legal nature, enforced by federal court on its law side). So state statutes which treat a proceeding to establish a will, in certain cases, as one of equity and not of probate jurisdiction, may be enforced in a federal court of equity; see Southworth v. Adams, 9 Biss. 523, 524, 4 Fed. 1 (proceeding to establish a lost will); Brodhead v. Shoemaker, 44 Fed. 518, 11 L. R. A. 569 (proceeding to probate will in "solemn form").

When Estate is in Custody of the State Court.— The limitation of the jurisdiction in administration matters consequent upon the possession of the estate by the probate court presents some questions of difficulty. In Byers v. McAuley, 149 U. S. 616–623, 13 Sup. Ct. 908–911, many of the previous cases in the supreme court are reviewed by Mr. Justice Brewer, who says, in part: "In order to pave the way to a clear understanding of this question, it may be well to state some general propositions which have become fully settled by the decisions of this court; and, first, it is a rule of general application that, where property is in the actual possession of one court of competent jurisdiction, such possession cannot be disturbed by process out of another court. . . . Secondly, an administrator appointed by a state court is an officer of that court. His possession of the decedent's property is a possession taken in obedience to the orders of that court. It is the possession of the court, and it is a possession which cannot be disturbed by any other court." The result of the discussion is thus summed up by the learned justice: "A citizen of another state may establish a debt against the estate (Yonley v. Lavender, 21 Wall. 276; Hess v. Reynolds, 113 U. S. 73, 5 Sup. Ct. 377); but the debt thus established must take its place and share of the estate as administered by the probate court, and it cannot be enforced by process directly against the property of the decedent (Yonley v. Lavender, *supra*). In like manner, a distributee, citizen of another state, may establish his right to a share in the estate, and enforce such adjudication against the administrator personally, or his sureties (Payne v. Hook, 7 Wall. 425), or against any other parties subject to liability (Borer v. Chapman, 119 U. S. 587, 7 Sup. Ct. 342), or in any other way which does not disturb the possession of the property by the state courts."

The following acts have been held to constitute an interference on the part of the federal court with property in the possession of the probate court: An execution levied on such property; Williams v. Benedict, 8 How. 107, 112; Yonley v. Lavender, 21 Wall. 276; Wickham v. Hull, 60 Fed. 326, 330; appointing a receiver to displace the executor; Haines v. Carpenter, 1 Woods, 269, 270, Fed. Cas. No. 5,905; Lant v. Manley, 71 Fed. 7, 12; Johnson v. Ford, 109 Fed.

tions of the English chancellor have not been granted to the United States courts, but are given to the several states, and are exercised either by the state legislatures or by the

501; adjudging that certain claims should be placed on equality with others which, under the state law, were entitled to a preference; Dodd v. Ghiselin, 27 Fed. 405, 407-410 (Brewer, J.); setting aside a sale of trust property comprising the residuary estate, while the estate is in the process of administration, and before the executors have rendered any account; Jordan v. Taylor, 98 Fed. 643. See also In re Foley, 80 Fed. 951.

The following acts have been held not to constitute an interference: Establishing a debt against the estate: Hess v. Reynolds, 113 U. S. 78, 5 Sup. Ct. 378; Black v. Scott, 9 Fed. 186, 191; Wickham v. Hull, 60 Fed. 326, 330. In Hess v. Reynolds the court says, by Miller, J.: "It may be convenient that all debts to be paid out of the assets of a deceased man's estate shall be established in the court to which the law of the domicile has confided the general administration of these assets. And the courts of the United States will pay respect to this principle in the execution of the process enforcing their judgments out of these assets, so far as the demands of justice require. But neither the principle of convenience nor the statutes of a state can deprive them of jurisdiction to hear and determine a controversy between citizens of different states when such a controversy is distinctly presented, because the judgment may affect the administration or distribution in another forum of the assets of the decedent's estate." It appears that a lien upon specific property entitling the lienholder to a special remedy is not impaired by the death of the owner, and such special remedy may be applied in proceedings against his executor or administrator in the federal courts: German Sav. & Loan Soc. v. Cannon, 65 Fed. 542, 545; Erwin v. Lowry, 7 How. 172, 181; and see Lant v. Manley, 75 Fed. 627, 634, 43 U. S. App. 623. When suits by distributees do not constitute an interference: see Payne v. Hook, *supra;* Byers v. McAuley, *supra;* Brendel v. Charch, 82 Fed. 262. Establishing a lien on the interests of heirs at law in an estate in the hands of an administrator: Ingersoll v. Coram, 127 Fed. 418.

In the following cases the property was held not to be in the custody of the probate court, and the limitation of the jurisdiction of the federal court, therefore, did not apply: Herschberger v. Blewett, 55 Fed. 170; Briggs v. Stroud, 58 Fed. 717, 720; where the assets have been distributed; Borer v. Chapman, 119 U. S. 587, 600, 7 Sup. Ct. 342, 348; where they are in the hands of the committee of a lunatic; Sullivan v. Andoe, 4 Hughes, 299, 6 Fed. 641, 650; or of an executor in his capacity as trustee; Ball v. Tompkins, 41 Fed. 489; where real property fraudulently conveyed by the decedent is sought to be reached, and the probate court, though empowered by statute to take possession of it, has not done so; Hale v. Tyler, 115 Fed. 833 (examining the cases with great thoroughness). In Ball v. Tompkins, *supra*, the court says, at page 490: "The possession contemplated as sufficient to make it exclusive is that which the court by its process, or some similar mode, has, either for the state tribunals. The United States supreme court has frequently laid down and acted upon this principle in deciding cases brought for the purpose of enforcing charitable trusts.[1] [a]

§ 295. **Fourth Principle: Inadequacy of Legal Remedies.**— The fourth principle also relates to the extent of the equitable jurisdiction, as that is affected by the most important provision of the statute.[1] In the judicial interpretation of this clause, it has been well settled that the section of the statute is merely declaratory of a familiar doctrine belonging to the general system of equity jurisdiction and jurisprudence. It does not take away or abridge the jurisdiction which is affirmatively granted, nor deprive the United States courts of any part of the field of powers occupied by the English court of chancery so far as the functions of that tribunal are judicial. In short, this section does not substantially affect the equitable jurisdiction of the national courts; their powers would have been the same, and subject to the same limits, if the provision had not been enacted.[2]

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§ 294, [1] Bodley v. Taylor, 5 Cranch, 191, 221, 222; Fontain v. Ravenel, 17 How. 369, 384; Canal Co. v. Gordon, 6 Wall. 561, 568; Case of Broderick's Will, 21 Wall. 503; Noonan v. Lee, 2 Black, 499, 509; Loring v. Marsh, 2 Cliff. 469, 493; Livingston v. Van Ingen, 1 Paine, 45. In Fontain v. Ravenel, 17 How. 369, a suit to establish a charitable trust, Mr. Justice McLean stated the doctrine as follows: "The courts of the United States cannot exercise any equity powers except those conferred by acts of Congress, and those *judicial* powers which the high court of chancery in England, acting under its judicial capacity as a court of equity, possessed and exercised at the time of the formation of the constitution of the United States. Powers not judicial, exercised by the chancellor merely as the representative of the sovereign, and by virtue of the king's prerogative as *parens patriæ*, are not possessed by the United States circuit courts." In Noonan v. Lee, 2 Black, 499, 509, Swayne, J., said: "Equity jurisdiction of the courts of the United States is derived from the constitution and laws of the United States. Their powers and rules of decision are the same in all the states. Their practice is regulated by themselves and by rules established by the supreme court. In all these respects they are unaffected by state legislation;" citing Neves v. Scott, 13 How. 270; Boyle v. Turner, 6 Pet. 658; Robinson v. Campbell, 3 Wheat. 323.

§ 295, [1] I refer to the United States Revised Statutes, section 723, being the same as section 16 of the Judiciary Act of 1789, quoted *ante*, in note under section 312.

direct purpose of the proceeding, or for some other purpose ancillary to the main object, drawn into its dominion and custody some thing. That thing may be corporeal or incorporeal, — a substance or a mere right. But a controversy, a question, an inquiry, is not such a thing. These may be the subject-matter of jurisdiction in a pending cause, which often proceeds, from the beginning to the judgment, without the court's having taken actual dominion of anything. But there is no exclusive jurisdiction over such a matter. The result may be a judgment which will establish a right, but the court has not had any possession."

(a) See also Mormon Church v. United States, 136 U. S. 1; King v. McLean Asylum of Massachusetts General Hospital, 64 Fed. 331, 352, 21 U. S. App. 481 (C. C. A.), 26 L. R. A. 795. In absence of statute, a bill by the United States to cancel a patent for fraud will not be entertained, since in England the power to cancel a patent was in the nature

§ 296. **Illustrations.**— The four foregoing principles may be justly regarded, I think, as the very foundations of the equitable jurisdiction of the United States courts. They give it whatever peculiar character it possesses growing out of the double organization of the national and state governments, and they clearly distinguish it from the jurisdiction possessed by any state tribunals. In the practical administration of their equitable powers, the national judiciary have constantly affirmed and steadily adhered to the doctrine in its negative form, that the equitable jurisdiction does not exist, or will not be exercised, in any case or under any circumstances where there is an adequate, complete, and certain remedy at law, sufficient to meet all the demands of justice.[1] [a] I have collected and placed in the foot-note a number of examples which will sufficiently illustrate the uniformity and consistency with which the United States judiciary have applied this negative rule under a great variety of circumstances.[2]

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[2] Boyce's Executors v. Grundy, 3 Pet. 210, 215; Baker v. Biddle, 1 Bald. 394, 403; Barber v. Barber, 21 How. 582, 591; Hunt v. Danforth's Ex'rs, 2 Curt. 592, 603; Bunce v. Gallagher, 5 Blatch. 481, 487. The doctrine of the text was clearly stated in Boyce's Executors v. Grundy, 3 Pet. 210, 215, by Johnson, J., and has been repeated by the subsequent cases: "This court has been often called upon to consider section 16 of the Judiciary Act of 1789, and as often, either expressly or by the course of its decisions, has held that it is merely declaratory, making no alteration whatsoever in the rules of equity on the subject of legal remedy. It is not enough that there is a remedy at law; it must be plain and adequate, or in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity."[a]

of a royal prerogative; United States v. American Bell Telephone Co., 32 Fed. 591, 605, 606.

(a) In the recent case of McConehay v. Wright, 121 U. S. 20, the supreme court of the United States again laid down the rule that the test of the equity jurisdiction of the courts of the United States, so far as the same was determined by the adequacy of the remedy at law, is the remedy which existed when the Judiciary Act of 1789 was adopted, unless subsequently changed by Congress, and is not the existing remedy in a state or territory by virtue of local legislation. See also Payne v. Kansas & A. Val. R. R. Co., 46 Fed. 546.

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[1] Thompson v. Railroad Co., 6 Wall. 134, 137; Parker v. Winnipiseogee, etc., Co., 2 Black, 545, 550; Knox v. Smith, 4 How. 298, 316; Wright v. Ellison, 1 Wall. 16, 22; Oelrichs v. Spain, 15 Wall. 211; Lewis v. Cocks, 23 Wall. 466, 470; Hungerford v. Sigerson, 20 How. 156; Hipp v. Babin, 19 How. 271; Baker v. Biddle, 1 Bald. 394, 405; Blakeley v. Biscoe, 1 Hempst. 114, 115; United States v. Meyers, 2 Brock. 516; Andrews v. Solomon, 1 Pet. C. C. 356; Shapley v. Rangeley, 1 Wood. & M. 213, 216, 2 Ware, 242; Pierpont v. Fowle, 2 Wood. & M. 23; Foster v. Swasey, 2 Wood. & M. 217.

[2] It has thus been decided that the jurisdiction, if concurrent, does not exist, and if exclusive, will not be exercised, in the following cases: Not to try the mere legal title to lands, or to recover possession of lands when only the legal title is disputed: Mezes v. Greer, 1 McAll. 401, 402; Hipp v. Babin, 19 How. 271; Lewis v. Cocks, 23 Wall. 466, 470; [b] nor for a breach of a simple contract of agency: Blakeley v. Biscoe, 1 Hempst. 114, 115; nor of suit by principal against his agent to recover for losses occasioned by the latter's negligence or misconduct: Vose v. Philbrook, 3 Story, 335, 344, 345; nor of suit by insurance companies to cancel a fire policy, and enjoin action at law thereon, on the ground of fraudulent representations in procuring the same, where the suit was brought *after* a loss: Home Ins. Co. v. Stanchfield, 1 Dill. 424, 429, 431–438, 2 Abb. 1; [c] whether the suit for a discovery

(a) See also the following leading cases: Insurance Co. v. Bailey, 13 Wall. 616, 620, 20 L. ed. 501; Grand Chute v. Winegar, 15 Wall. 373, 21 L. ed. 170; Buzard v. Houston, 119 U. S. 347, 351, 4 Sup. Ct. 249, 30 L. ed. 451; Whitehead v. Shattuck, 138 U. S. 151, 11 Sup. Ct. 276, 34 L. ed. 873.

(b) See also Killian v. Ebbinghaus, 110 U. S. 568.

(c) See also Insurance Co. v. Bailey, 13 Wall. 616, 20 L. ed. 501. If a defendant, an insurance company, has an adequate remedy at law by defense to an action on a policy, and a right to a removal of the action from a state to a federal court by reason of diverse citizenship, the fact that such removal may subject it to a revocation of its license to do business in the state does not render its legal remedy so inadequate as to afford an occasion for the exercise, by a federal court, of equitable jurisdiction to cancel the policy; Cable v. United States Life Ins. Co. (U. S.), 24 Sup. Ct. 74.

§ 297. **Effect of State Laws.**— On the other hand, the affirmative form of the rule has also been uniformly asserted and maintained, that the equitable jurisdiction exists and will be exercised in all cases, and under all circumstances, where the remedy at law is not adequate, complete, and certain, so as to meet all the requirements of justice. That there *is* a legal remedy is not enough; such remedy, in order to oust or prevent the equitable jurisdiction, must be in all respects as satisfactory as the relief furnished by a court of equity.[1] [a] Not intending to re-examine the ques-

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has been abrogated by statutes making parties liable to be called as witnesses for their adversaries: Home Ins. Co. v. Stanchfield, 1 Dill. 424, 429, 431–438, 2 Abb. 1; when suit will not be sustained to set aside a sale on ground of fraud: Andrews v. Solomon, 1 Pet. C. C. 356; Foster v. Swasey, 2 Wood. & M. 217; nor to recover on contract which has been entirely performed, except the payment of the money due thereon; and equity has no jurisdiction to compel municipal officers to levy a tax in order to provide a fund for the payment of such a contract: Heine v. Loan Commissioners, 19 Wall. 655, 1 Woods, 246; nor of a suit brought to enforce a decree in equity for the payment of money alone: Telford v. Oakley, 1 Hempst. 197; nor of a suit to declare the future rights which may arise under a will: Cross v. De Valle, 1 Wall. 1, 1 Cliff. 282; nor of a suit for a divorce or for alimony: Barber v. Barber, 21 How. 582, 584; nor of a suit to establish the probate of a will, nor to set aside the probate of a will on any ground: Fouverne v. New Orleans, 18 How. 470, 473; nor of a suit to set aside a will or the probate thereof, on the ground of forgery or of fraud; nor to declare the executor, or legatee, or devisee in such a will a trustee: Case of Broderick's Will, 21 Wall. 503; nor to maintain the "proceedings supplementary to execution," authorized by a state code of procedure, the proper equitable remedy being a "creditor's suit": Byrd v. Badger, 1 McAll. 443, 444–446; when the jurisdiction will not be exercised in a case of private nuisance: Parker v. Winnipiseogee Co., 2 Black, 545, 550; nor to enjoin any suit pending in a state court: Rogers v. Cincinnati, 5 McLean, 337; nor to enjoin a sheriff under ordinary circumstances from levying on and selling, under an execution against a third party, any property in which the plaintiff is interested, an action at law for damages being ample remedy: Knox v. Smith, 4 How. 298, 316; nor to enforce a forfeiture: Horsburg v. Baker, 1 Pet. 232, 236; for limitations upon the jurisdiction of the national courts in enforcing vague and uncertain charities: See Fontain v. Ravenel, 17 How. 369, 384.

[1] Pratt v. Northam, 5 Mason, 95, 105; Baker v. Biddle, 1 Bald. 394, 403–411; United States v. Meyers, 2 Brock. 516. In the case of Baker v. Biddle, 1 Bald. 394, 405, Baldwin, J., said: "It follows that wherever a

(a) Cited, Mann v. Appel, 31 Fed. 378, 383, a creditors' bill. See also the following leading cases enunciating this principle: Boyce's Ex'rs v. Grundy, 3 Pet. 210, 215, 9 L. ed. 127; Watson v. Sutherland, 5 Wall. 74, tions concerning jurisdiction which have been discussed in the preceding chapters, I have merely collected and placed in the foot-note a few decided cases as examples, which will illustrate the manner in which the United States courts have applied the foregoing affirmative rule, and have exercised their equitable powers under a variety of circumstances.[2]

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court of law is competent to take cognizance of a right, and has power to proceed to a final judgment which affords a remedy plain, adequate, and complete, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right of trial by jury. If the right is only an equitable one, or if the right being legal, the remedy is only equitable, or both legal and equitable, partaking of the character of both, and a court of law is unable to afford a remedy according to its old and settled proceedings commensurate with the right, then the suit for its assertion may be in equity. . . . The tests of the relative jurisdiction over suits at law and in equity are,—1. The subject-matter; 2. The relief; 3. Its application; 4. The competency of a court of law to afford it." The judgment of Mr. Justice Baldwin in this case is, in my opinion, one of the ablest, clearest, and most accurate statements of the true doctrines concerning the equitable jurisdiction to be found in the whole range of reports, English and American.

[2] The equitable jurisdiction has been held to exist and has been exercised in the following cases, on the ground that the legal remedy is inadequate: On behalf of the one having the equitable estate in land, to compel a conveyance to him of the legal estate: Bodley v. Taylor, 5 Cranch, 191, 221, 222; in "creditors' suits" and suits similar thereto: Dunphy v. Kleinsmith, 11 Wall. 610, 614; Lorman v. Clark, 2 McLean, 568; Bean v. Smith, 2 Mason, 252, 267, 268; in suit to foreclose a mortgage, even in a state where the common-law mortgage is not known: Walker v. Dreville, 12 Wall. 440; in a suit to enforce a lien created by statute, and to enforce liens generally: Canal Co. v. Gordon, 6 Wall. 561, 568; Heine v. Loan Com'rs, 19 Wall. 655, 1 Woods, 246;[b] to remove a cloud from title: Loring v. Dorner, 1 McAll. 360, 362–365; in an "administration suit": Pratt v. Northam, 5 Mason, 95, 105; to enforce charitable trusts, so far as the same can be done by *judicial* action: Fontain v. Ravenel, 17 How. 369, 384; to regulate and control one railroad company in the construction of its tracks across those of another company, where the state legislation has not prescribed any

78, 18 L. ed. 580; Insurance Co. v. Bailey, 13 Wall. 616, 620, 20 L. ed. 501; Lewis v. Cocks, 23 Wall. 466, 470, 23 L. ed. 70; Drexel v. Berney, 122 U. S. 241, 252, 7 Sup. Ct. 1200, 30 L. ed. 1219; Allen v. Hanks, 136 U. S. 300, 311, 10 Sup. Ct. 961, 34 L. ed. 414; Kilbourn v. Sunderland, 130 U. S. 505, 514, 9 Sup. Ct. 594; Rich v. Braxton, 158 U. S. 375, 406, 15 Sup. Ct. 1006, 39 L. ed. 1022.

(b) This note and paragraph of the text are cited in Hibernia S. & L. Soc. v. London & Lancashire Fire Ins. Co., 138 Cal. 257, 71 Pac. 334, holding that the enforcement of statutory liens is a matter of equity jurisdiction.

In order to prevent a misconception of the foregoing rules concerning the equitable jurisdiction of the national courts, there is one limitation which must be constantly borne in mind. Since the original jurisdiction of the United States courts — especially of the circuit courts — in large measure depends upon the state citizenship of the litigant parties as its sole basis, it follows that in some cases of ordinary controversies — in all those which do not directly arise under statutes of Congress or provisions of the United States constitution — the subject-matter of the suit, the primary rights, interests, or estates to be maintained and protected, are created and regulated by state laws alone. While, therefore, it is correctly held that the equitable *jurisdiction* of the national courts, their power to entertain and decide equitable suits and to grant the remedies

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manner: Chicago & N. W. R. R. v. Chicago & Pac. R. R., 6 Biss. 219, 221, 222; to carry into full effect the provisions of a bankrupt act passed by Congress, and in matters of accounting generally: Mitchell v. Great Works, etc., Mfg. Co., 2 Story, 648; in cases of fraud, misrepresentation, and concealment, to give the relief of cancellation, etc.: Jones v. Bolles, 9 Wall. 364, 369; in suit by insurance company brought before a loss to cancel a fire policy on the ground of fraud in its procurement: Home Ins. Co. v. Stanchfield, 1 Dill. 424, 429, 431–438, 2 Abb. 1; to set aside and cancel a written agreement on the ground of fraud: Boyce's Ex'rs v. Grundy, 3 Pet. 210, 215; when equity can give relief against a forged or fraudulent will which has been admitted to probate, to parties entitled to the estate: Case of Broderick's Will, 21 Wall. 503; to set aside a forged deed of land at the suit of the pretended grantor, although the deed is absolutely void: Bunce v. Gallagher, 5 Blatch. 481, 487; citing Peirsoll v. Elliott, 6 Pet. 95; Hamilton v. Cummings, 1 Johns. Ch. 517; in a suit for a discovery and an accounting: Baker v. Biddle, 1 Bald. 394, 403–411; to recover amount due on a decree for alimony rendered by a state court in a suit for divorce, where the husband had removed to another state: Barber v. Barber, 21 How. 582, 584, 591; to restrain a private nuisance: Parker v. Winnipiseogee, etc., Co., 2 Black, 545, 550–553; in a case of trust: United States v. Meyers, 2 Brock. 516; by a married woman against an executor to recover money given by the will to her separate use: Hunt v. Danforth, 2 Curt. 592, 603; by stockholders against a corporation and its managers to prevent or redress wrongful acts and dealings with corporate property and franchises: Pond v. Vermont Valley R. R., 2 Blatch. 280, 287; to enforce a payment of a judgment for money recovered at law against a municipal corporation which is wholly insolvent: Putnam v. New Albany, 4 Biss. 365; to enforce by appropriate remedies any equitable rights which may be created by state laws: Clark v. Smith, 13 Pet. 195, 203.

properly belonging to a court of equity, is wholly derived from the constitution and laws of the United States, and is utterly unabridged by any state legislation, yet, on the other hand, the primary rights, interests, and estates which are dealt with in such suits and are protected by such remedies are within the scope of state authority, and may be altered, enlarged, or restricted by state laws.[8] (c) The equitable jurisdiction of the national courts is not directly affected by the state statutes, but what may be finally accomplished by the exercise of that jurisdiction, what estates, property rights, and other interests of the litigants may be maintained, enforced, or enjoyed by its means, must depend to a great extent upon the policy of legislation adopted in each individual state.

§ 298. **Territorial Limitations.**—There is one other special feature of the jurisdiction which remains to be considered, growing out of the peculiar organization of the national judiciary, and the restriction of the powers of each court within certain territorial limits or districts which are either coincident with or definite parts of the separate states.[1] This feature to which I refer is the locality of the subject-matter of the suit — its territorial position within a certain state or district — in its effect upon the jurisdiction. In respect to this matter, the following propositions have been established by repeated and unanimous decisions: Where the subject-matter of the suit is strictly local, the jurisdiction of the United States court depends upon such locality, and can only be exercised in the state where the subject-matter is situated; in other words, where the subject-matter is local, and the suit is brought for the purpose of directly affecting or acting upon this subject-matter, and the decree when rendered and the relief when granted would operate directly upon such subject-matter, and not merely upon the person of the party defendant, then the situation of the subject-matter determines the proper place for the exercise of the jurisdiction; the jurisdiction can only be exercised in the state where such subject-matter is located.[2] It follows as a necessary consequence that where a court of the United States is sitting in one state, no decree which it renders can directly affect land situated in another state. On the other hand, although the subject-matter may be local, — as, for example, a tract of land,— still if the object of the suit is to directly deal with and affect the person of the defendant party, and not this subject-matter itself, and the decree when rendered and the relief when granted would in fact directly affect and operate upon the person of the defendant only, and would not directly operate upon the subject-matter, then the suit may be maintained in any state or district where the court obtains jurisdiction of the person of the defendant, although the subject-matter of the controversy referred to and described in the decree, and ultimately but indirectly affected by the relief granted, may be situated in another state. Under this rule, it is well settled that equitable suits for the specific performance of contracts, for the enforcement of trusts, for relief on the ground of fraud, actual or constructive, or for the final accounting and settlement of a partnership, are not local, although the land or other subject-matter may be situated in a state different from that in which the action is pending. Such a suit may be brought in any state where jurisdiction is obtained of the defendant's person. It should be carefully observed, however, that a decree in such a suit directing a conveyance of the land under the contract, or in pursuance of the trust, or directing a sale or conveyance of the partnership land, or a transfer of the estate affected by the fraud, only binds and operates upon the person of the defendant; it is not of itself a muniment of title, and does not of itself transfer any title; it can only be carried into effect by an actual conveyance executed by the defendant; and the execution of such conveyance can only be compelled by proper proceedings directed against the defendant personally, such as attachment, fine, and imprisonment.[3] I have thus described the distinctive elements of the jurisdiction held by the United States courts, and proceed to consider the several states as they may be arranged in a few groups or classes, and take first in order the class in which the jurisdiction is or has been wholly statutory, special, and restricted.

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[8] As a familiar illustration of this proposition, I mention the statutes in many states modifying and reconstructing the whole subject of trusts in real and personal property, and creating the separate property of married women, and the like. While such state statutes do not abridge the jurisdiction of the national courts to entertain equitable suits concerning trusts or married women's property, they, of course, determine the rights growing out of these trusts or of the married women holding separate property.

[1] In most instances, a state constitutes a single judicial district of the United States. Some of the larger states, like New York, Pennsylvania, Ohio, and others, are divided into two or more judicial districts. In no instance does a district embrace two states, or portions of different states.

(c) See also Independent District of Pella v. Beard, 83 Fed. 5, 13–16, and cases cited; Irvine v. Marshall, 20 How. 565, 15 L. ed. 998; Andrews Bros. Co. v. Youngstown Coke Co., 39 Fed. 353; Deek v. Whitman, 96 Fed. 873.

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[2] Miss. & Mo. R. R. v. Ward, 2 Black, 485; Massie v. Watts, 6 Cranch, 148; North. Indiana R. R. v. Mich. Cent. R. R., 15 How. 233, 5 McLean, 444; Tardy v. Morgan, 3 McLean, 358. These cases will sufficiently illustrate both the meaning of the rule and its application. In Miss. & Mo. R. R. v. Ward, 2 Black, 485, it was held that the United States circuit court in Illinois had no jurisdiction of a suit brought to abate a nuisance which was situated across the Mississippi River, within the territory of Iowa. In Massie v. Watts, 6 Cranch, 148, it was held that a suit on behalf of the one holding the equitable estate in certain land to compel a conveyance to him of the legal title is thus local, and can only be maintained in the state where the land is situated. In North. Indiana R. R. v. Mich. Cent. R. R., 15 How. 233, a suit brought in Michigan, directly dealing with the title and ownership of a railroad situated in Indiana, was dismissed for want of jurisdiction.

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[3] Massie v. Watts, 6 Cranch, 148; Watkins v. Holman, 16 Pet. 25, 26; Briggs v. French, 1 Sum. 504; Lyman v. Lyman, 2 Paine, 11, 13; Carrington's Heirs v. Brents, 1 McLean, 167; Watts v. Waddle, 1 McLean, 200; Tardy v. Morgan, 3 McLean, 358. In Massie v. Watts, 6 Cranch, 148, the supreme court held that while a suit by the equitable owner of land to compel a conveyance of the legal estate is local, and can only be brought in the state where the land is situated, a suit on contract, or trust, or fraud is not thus local. Watkins v. Holman, 16 Pet. 25, is a leading authority. It decided that a United States court in one state may by its decree order the conveyance of land in another state, and the decree may be enforced against the defendant personally. But the decree itself does not operate on the land nor on the title, nor does any conveyance made under the decree by an officer, nor by any one else other than the very person himself in whom the title to the land is vested. In Briggs v. French, 1 Sum. 504, the same rule was applied by Story, J., to cases of fraud, either actual or constructive. In Lyman v. Lyman, 2 Paine, 11, the rule was applied to a suit for the settlement of a partnership and a sale of firm lands situated in another state. In Tardy v.

§ 299. **New Hampshire — General Extent and Nature.**— The statute quoted in the preceding section,[1] while it particularly mentions several important specific heads of equity jurisprudence and equitable cognizance, also contains in its general clauses a very broad and comprehensive grant of equity jurisdiction. The courts of New Hampshire have given a very liberal interpretation to this enactment. Unlike the courts of Massachusetts, they have not regarded the language "in all other cases where there is not a plain, adequate, and complete remedy at law" as restrictive, or as imposing any new and statutory limitation upon the jurisdiction otherwise belonging to the court of chancery; but, following the example of the United States courts in dealing with a similar provision of the Judiciary Act, they have treated the clause as merely declaratory of the well-known principle which forms an essential element of the general equitable jurisdiction as exercised in England and throughout this country. In fact, according to the conclusions reached by the court after a careful historical examination, it seems to be decided that the equitable jurisdiction now possessed by the New Hampshire courts is not derived from this statute; that it existed to its full extent during the colonial period, and has never been abrogated or abandoned;

Morgan, 3 McLean, 358, the same rule was reaffirmed, and it was further held that the conveyance made by the defendant in pursuance of the decree operates under the deed of conveyance itself, and not under the decree merely.[a]

[1] See *ante*, note under § 286.

(a) See also Montgomery v. United States, 36 Fed. 4, a case of the specific performance of a contract for the sale of land outside the state; and Hart v. Sansom, 110 U. S. 155, 3 Sup. Ct. 586; Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. 269. In the latter case, a suit was sustained to restrain the prosecution of a suit in another state. The subject is further considered in Pom. Eq. Rem., Introduction.

and that the provisions now contained in the Revised Statutes of the state, which were adopted in 1832, instead of being the original source of the equitable powers, are simply regulative and limiting in their effect. The practical conclusion to be derived from a comparison of the leading decisions is, that with respect to the heads of equitable cognizance enumerated in the statute, and with respect to the matters embraced in the broader and more general grant of authority, the courts of New Hampshire possess the full equitable jurisdiction, equal in all respects to that exercised by the high court of chancery in England, so far as it has power to deal with the same subject-matter. As the statute, like some portions of the United States constitution, enumerates, rather than describes, the courts, in their liberal mode of interpretation, have held that their jurisdiction includes all the incidental and auxiliary details, powers, and remedies belonging to the general system of equity jurisprudence, and reasonably necessary to render their principal functions effective in the due administration of justice according to the methods and usages of equity; and that this jurisdiction has not been restricted, abridged, or modified, because the courts of law may have obtained the concurrent power to grant similar remedies which in some cases may be regarded as adequate.[2] In other words, while the equitable jurisdiction of New Hampshire is not *in its extent* actually commensurate with that of the English court of chancery, yet so far as it *does* extend, and with respect to all matters embraced within its scope, it is identical with the jurisdiction held by any court of general equitable powers. Having thus shown the liberal spirit in which the courts of New Hampshire have interpreted the statutes, and their tendency to maintain and enlarge their own equitable powers, and the comprehensive equitable jurisdiction which they possess, I shall now describe, in a very brief and summary manner, the practical results which have been reached by applying this mode of interpretation to the most important subjects of equitable cognizance.

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[2] Wells v. Pierce, 27 N. H. 503, 512 (1853); Walker v. Cheever, 35 N. H. 339, 349; Bean v. Coleman, 44 N. H. 539, 547; Samuel v. Wiley, 50 N. H. 353, 354, 355; Craft v. Thompson, 51 N. H. 536, 542. Since the discussion in several of these cases is very able, and since the conclusions reached will apply in other states as well as in New Hampshire, and will aid in determining the extent of *their* equitable jurisdiction, I shall quote some instructive passages from one or two of these opinions. The case of Wells v. Pierce, 27 N. H. 503, is especially interesting. The historical review by Mr. Justice Bell might doubtless throw much light upon the equitable system in others of the older states. I quote from his opinion, at page 512: "This court has a broad jurisdiction as a court of equity in all cases of trust, fraud, accident, or mistake. The limits of its jurisdiction in these cases are co-extensive with those of the court of chancery and other courts of equity in England. Equity, as a great branch of the law of their native country, was brought over by the colonists, and has always existed as a part of the common law, in its broadest sense, in New Hampshire. While our territory was under the colonial government of Massachusetts, there is

reason to believe that the general court exercised original chancery jurisdiction: Wash. Jud. Hist. of Mass. 34; Ann. Charters of Mass. 94. Under the first royal governor of this province, Robert Mann was appointed chancellor of the province, and among the early records are to be found bills in equity which were heard and decided before him: 1 Belk. Hist. 198, 200. In 1692, by 'An act for establishing courts of judicature,' it was provided that 'there shall be a court of chancery within this province, which said court shall have power to hear and determine all matters of equity, and shall be esteemed and accounted the high court of chancery of this province; that the governor and council be the said high court of chancery,' etc. It is not known that this law was ever repealed, and it is supposed that the governor and council, who composed the court of appeals, continued to exercise chancery powers till the Revolution. . . . Equity having thus always constituted a part of the law of New Hampshire, though there was a long period after the Revolution when there was no chancery court, and the jurisdiction conferred on this court in 1832 being as broad as equity itself, the question whether this court will lose its jurisdiction because there is adequate remedy at law is to be decided here as it would be in England. If courts of equity had jurisdiction in certain cases for which the ordinary proceedings at common law did not then afford an adequate remedy, that jurisdiction will not be lost because authority to decide in such cases has been conferred on courts of law by statute, unless there are negative words excluding the jurisdiction of courts of equity. . . . It is well known that equitable relief can be but very imperfectly obtained in courts of law, because the power of those courts and their modes of practice are ill adapted for that purpose. On the investigation of all questions of fraud, the discovery by the oath of the party is one of the effectual means for its detection. The common law affords no means of obtaining such discovery, and the recent statutory enactments [in New Hampshire] are but an untried experiment, which *may* fall much short of the discovery in chancery." Walker v. Cheever, 35 N. H. 339, 349, per Eastman, J.: "Whatever doubts may have been

It will appear that a complete system of equity jurisprudence has been developed within the limits which fix the extent of the equitable jurisdiction.

§ 300. **Specific Performance.**— The courts of New Hampshire possess the full power to decree the specific performance of executory contracts, whenever, according to the doctrines of equity jurisprudence, such remedy is or may be granted, without any exception or limitation.[1] The jurisdiction includes, in its fullest extent, the specific enforcement of verbal contracts for the purchase and sale of lands, either where the agreement is admitted by the defendant in his pleading, or where a part performance has taken the case out from the operation of the statute of frauds. The interpretation put upon their statutes by the courts of Massachusetts and of Maine, whereby the power to enforce the specific performance of such verbal contracts has been denied, is expressly rejected.[2] In administering this

entertained heretofore, we regard it as now settled that this court, as a court of equity, has full chancery powers, and a general equity jurisdiction: Wells v. Pierce, 27 N. H. 503; and that it will administer relief in all cases falling within equity jurisdiction, where the statutes of the state have not provided other means of redress." The court further held that the objection that there was an adequate remedy at law would not apply to the case, since it is a well-established principle that the equitable jurisdiction once existing will not be lost or ousted because the courts of law have adopted equitable principles and give relief under circumstances which formerly belonged to the domain of equity alone. Craft v. Thompson, 51 N. H. 536, 542, per Foster, J.: "The jurisdiction of a court of equity, especially under the statute, is very comprehensive, and in all cases of fraud, mistake, or accident, courts of equity may, in virtue of their general jurisdiction, interfere to set aside awards, upon the same principles and reasons which justify their interference in regard to other matters where there is no adequate remedy at law. And this court may, by statute, 'grant writs of injunction whenever the same is necessary to prevent fraud or injustice': Gen. Stats., chap. 190, § 1."

[1] Newton v. Swazey, 8 N. H. 9, 11; Tilton v. Tilton, 9 N. H. 385, 389; Powers v. Hale, 25 N. H. 145; Pickering v. Pickering, 38 N. H. 400, 407; Bunton v. Smith, 40 N. H. 352; Eastman v. Plumer, 46 N. H. 464, 478; Chartièr v. Marshall, 51 N. H. 400; Ewins v. Gordon, 49 N. H. 444.

[2] Newton v. Swazey, 8 N. H. 9, 11; Tilton v. Tilton, 9 N. H. 385, 389; Bunton v. Smith, 40 N. H. 352. In Tilton v. Tilton, 9 N. H. 385, Wilcox, J., said: "It is no objection to the power of a court of equity to decree a specific performance, that the contract is proved only by parol testimony.

remedy the courts have adopted all the settled rules of equity which govern its use, admitting all of the equitable limitations and defenses which are really meant by the ordinary language which describes it as "discretionary."[3]

§ 301. **Mortgage, Foreclosure, and Redemption.**— As the statute in express terms gives jurisdiction in cases "of the redemption and foreclosure of mortgages," no question could arise as to the existence of a full power to grant these remedies under all circumstances of equitable cognizance. It is decided, however, that this grant of equitable jurisdiction in cases of redemption has not repealed by implication a prior statute passed in 1829, by which it is provided that if the mortgagee should be in quiet possession of the mortgaged premises for one year after condition broken, without payment or lawful tender of the debt within that time, the mortgagor should be thereby forever barred and foreclosed of his right to redeem. This statutory foreclosure or bar is not abrogated by the right of redemption by means of a suit in equity.[1] A suit in equity may be maintained to redeem a pledge, if an accounting is necessary to ascertain the amount due, or there has been an assignment of the pledge.[2]

§ 302. **Discovery.**— The statute mentions cases "of discovery, where discovery may be had according to the course of proceedings in equity." The earlier decisions plainly admit a discovery, in suits brought both for discovery and

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Cases in Massachusetts and Maine are not in point on this subject, as they rest upon the peculiar provisions of their statutes conferring chancery powers. This court has the power to decree the specific performance of contracts generally without qualification; and it is a reasonable construction that our powers on this subject conform substantially to the practice of courts of chancery in England, so far as that practice may be applicable to our condition."

[3] Powers v. Hale, 25 N. H. 145; Pickering v. Pickering, 38 N. H. 400, 407; Eastman v. Plumer, 46 N. H. 464, 478; Chartier v. Marshall, 51 N. H. 400. In Ewins v. Gordon, 49 N. H. 444, a unilateral contract in the form of a penal bond for the conveyance of land was enforced.

[1] Wendell v. New Hampshire Bank, 9 N. H. 404, 416.

[2] White Mts. R. R. v. Bay State Iron Co., 50 N. H. 57 (1870).

relief, as a source of jurisdiction, or rather, perhaps, as an aid to the exercise of the jurisdiction in cases where the subject-matter, such as fraud, is of itself one of equitable cognizance. The more recent decisions leave no doubt that the so-called "American rule," formerly adopted in some of the states, whereby a discovery is regarded as an independent ground of a concurrent jurisdiction to adjudicate upon purely legal rights and to grant purely legal remedies in cases not otherwise belonging to the equitable jurisdiction, is rejected by the courts of New Hampshire.[1] The suit for a discovery proper without any relief, in aid of an action or defense at law, seems to be admitted, although the decisions are not very explicit.[2] [a]

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[1] Tappan v. Evans, 11 N. H. 311, 325; Stevens v. Williams, 12 N. H. 246; Stone v. Anderson, 26 N. H. 506, 518; Miller v. Scammon, 52 N. H. 609, 610 (1873). In the first three of these cases the suit was for a discovery and relief, and the discovery was held proper, and even the jurisdiction of the court was spoken of as partly, at least, based on the discovery. But in each case the relief was sought on the ground of fraud, and the jurisdiction was expressly held to exist independently of any discovery. In the latest case of Miller v. Scammon, 52 N. H. 609, 610, which was also one of fraud, Foster, J., after stating the general jurisdiction of equity in cases of fraud, added: "And it is said that in some cases of fraud for which the common law affords complete and adequate relief, chancery may have concurrent jurisdiction. This general proposition, however, is too broad when applied to our practice, under the rules of evidence which permit and require parties to testify. In the English practice, and perhaps in some American states, equity may entertain this concurrent jurisdiction, because, although the remedy at law may be said to be adequate, the means of obtaining the truth, where discovery by the oath of the party is essential, may be wanting or deficient in the courts of common law. . . . But to a very great extent the right to enforce discovery and search the conscience of the party, which was formerly only to be had in chancery, is afforded in the practice and by the statutes of our law courts as fully and effectually as by a court of equity." This opinion fully sustains the conclusions reached by me in the text of a former paragraph, concerning the effect of the modern statutes upon the doctrine respecting discovery as an independent source of jurisdiction. See *ante*, § 230.

[2] Stevens v. Williams, 12 N. H. 246; Dennis v. Riley, 21 N. H. 50; Robinson v. Wheeler, 51 N. H. 384. In Stevens v. Williams, 12 N. H. 246, which

(a) That an action for discovery, without relief, is permissible in New Hampshire was determined in the very interesting and important case of Reynolds v. Burgess Sulphite Fiber Co., 71 N. H. 332, 93 Am. St. Rep. 535, 57 L. R. A. 949, 51 Atl. 1075, where the right of inspection of per-

§ 303. Fraud, Cancellation, Rescission, and Other Remedies.[a] — The general equitable jurisdiction in cases of fraud, and the power to grant a cancellation, a rescission, an injunction, an accounting, or any other kind of remedy, necessary, under the circumstances, to attain the ends of justice, are asserted in the most emphatic manner.[1] I have placed in the foot-note some illustrations of the manner in which this branch of the jurisdiction has been exercised, and of the remedies which have been granted.[2]

§ 304. Mistake: Reformation, and Other Remedies.— The jurisdiction over all cases of mistake which are matters of equitable cognizance, and to grant all the appropriate remedies therein, is asserted in the same broad and unrestricted

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was a bill for discovery and relief, the court expressly declined to discuss the question whether a suit for a discovery alone in aid of an action or defense at law was within the jurisdiction. But in the two other cases cited, the propriety of such a suit is admitted, by judicial *dicta* at least.

[1] Dodge v. Griswold, 8 N. H. 425; Tappan v. Evans, 11 N. H. 311, 325; Stevens v. Williams, 12 N. H. 246; Rand v. Redington, 13 N. H. 72, 76, 38 Am. Dec. 475; Brewer v. Hyndman, 18 N. H. 9, 17; Tracy v. Herrick, 25 N. H. 381, 394; Stone v. Anderson, 26 N. H. 506, 518; Wells v. Pierce, 27 N. H. 503, 512; Lyme v. Allen, 51 N. H. 242; Craft v. Thompson, 51 N. H. 536, 542; Miller v. Scammon, 52 N. H. 609, 610; Marston v. Durgin, 54 N. H. 347, 374; Gordon v. Gordon, 55 N. H. 399; Moore v. Kidder, 55 N. H. 488; Hathaway v. Noble, 55 N. H. 508.

[2] Remedy of cancellation in general: Tappan v. Evans, 11 N. H. 311, 325; Stone v. Anderson, 26 N. H. 506, 518; setting aside or canceling a deed fraudulent as against creditors: Dodge v. Griswold, 8 N. H. 425; setting aside an award on the ground of fraud: Rand v. Redington, 13 N. H. 72, 77, 38 Am. Dec. 475; Tracy v. Herrick, 25 N. H. 381, 394; Craft v. Thompson, 51 N. H. 536, 542; setting aside a fraudulent mortgage; Brewer v. Hyndman, 18 N. H. 9, 11; setting aside a decree of a probate court obtained through fraud: Gordon v. Gordon, 55 N. H. 399; injunction to restrain commission of fraud: Marston v. Durgin, 54 N. H. 347, 374; injunction against a judgment at law obtained by fraud, or to which there was a defense of fraud: Lyme v. Allen, 51 N. H. 242; Craft v. Thompson, 51 N. H. 536, 542; suit in aid of a proceeding at law to prevent a party from fraudulently transferring his property so as to defeat the collection of a judgment to be recovered against him: Moore v. Kidder, 55 N. H. 488; delay and laches of the defrauded party, their effect upon his right to relief against the fraud: Hathaway v. Noble, 55 N. H. 508.

sonal property belonging to the defendant, in aid of an action for a personal tort, was enforced.

(a) This paragraph is cited in Druon v. Sullivan, 66 Vt. 609, 30 Atl. 98.

terms as that over cases of fraud.[1] The equitable doctrines concerning the reformation of written instruments on account of mistake are fully accepted. The American rule which permits parol evidence of such a mistake on behalf of the plaintiff who seeks to reform an agreement and then to compel its specific performance as thus reformed, as well as on behalf of the defendant who seeks to defeat its performance by proving a mistake, is also adopted.[2] The remedy of rescission may also be granted; as, for example, where an award is set aside on account of mistake.[3] Other reliefs may be given, depending upon the special circumstances of the case.[4]

§ 305. **Trusts.**— Jurisdiction is expressly given by the statute in cases of trust as well as of fraud and mistake. This embraces, it has been held, not merely the general power to enforce the performance of a trust against the trustee at the suit of the beneficiary, but all the incidental and auxiliary powers and remedies which may be necessary to maintain and protect the rights of all the parties interested; as, for example, the removal of trustees, the appointment of trustees, the interpretation and construction of instruments creating a trust, the direction and management of trustees in the performance of their duties, the supervision of investments of trust property, and other like incidents.[1]

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[1] Rand v. Redington, 13 N. H. 72, 76, 38 Am. Dec. 475; Bellows v. Stone, 14 N. H. 175; Smith v. Greeley, 14 N. H. 378; Underwood v. Campbell, 14 N. H. 393; Craig v. Kittredge, 23 N. H. 231; Tracy v. Herrick, 25 N. H. 381, 394; Wells v. Pierce, 27 N. H. 503, 512; Busby v. Littlefield, 31 N. H. 193, 199, 33 N. H. 76; Avery v. Bowman, 40 N. H. 453, 77 Am. Dec. 728; Craft v. Thompson, 51 N. H. 536, 542; Bradford v. Bradford, 54 N. H. 463.

[2] Bellows v. Stone, 14 N. H. 175 (parol evidence on behalf of the plaintiff in case of reformation and specific performance, as well as on part of the defendant); Smith v. Greeley, 14 N. H. 378; Busby v. Littlefield, 31 N. H. 193, 199, 33 N. H. 76; Bradford v. Bradford, 54 N. H. 463 (when a reformation will not be granted).

[3] Rand v. Redington, 13 N. H. 72, 76, 38 Am. Dec. 475; Tracy v. Herrick, 25 N. H. 381, 394; Craft v. Thompson, 51 N. H. 536, 542.

[4] Avery v. Bowman, 40 N. H. 453, 77 Am. Dec. 728. A mistake was made in levying an execution by which a too large amount of land was taken and transferred to the execution creditor. Such mistake may be corrected by a decree compelling the creditor to reconvey the excess to the judgment debtor.

§ 306. **Accounting.**— Although this remedy is not specifically mentioned in the statute, the jurisdiction to compel an accounting and to settle accounts exists, and is exercised by the courts, under the regulations, restrictions, and limitations governing its use, which form a part of equity jurisprudence.[1]

§ 307. **Injunction.**— The statute expressly authorizes an injunction "whenever the same is necessary to prevent fraud and injustice." The jurisdiction has been exercised in a very careful and guarded manner, and the courts have shown a tendency to restrict rather than to enlarge its use.[1] Where the facts and circumstances are sufficient, and the remedy at law is inadequate, it may be granted to restrain a private nuisance,[2] to prevent waste,[3] to restrain a trespass when it is continuous or would produce irreparable injury,[4] and to stay an action, judgment, or execution at law.[5] An injunction may also be proper in a suit by stock-

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§ 305, [1] Wells v. Pierce, 27 N. H. 503, 512; Wheeler v. Perry, 18 N. H. 307, 311 (construction of the trust, aiding and directing the trustee, in the management of the trust property); Petition of Baptist Church, 51 N. H. 424 (same as the last); Methodist Epis. Soc. v. Heirs of Harriman, 54 N. H. 444, 445 (charitable trusts, direction of investments, etc.); but under this general power over trusts, the courts of New Hampshire do not possess the jurisdiction to entertain the "administration suit" under ordinary circumstances: Walker v. Cheever, 35 N. H. 339, 349.

§ 306, [1] Walker v. Cheever, 35 N. H. 339, 349 (will not exercise the jurisdiction when the account is all on one side, and no discovery is asked); Treadwell v. Brown, 41 N. H. 12 (accounting and settlement of a partnership at suit of a creditor of one individual partner); Dennett v. Dennett, 43 N. H. 499, 501, 503 (account of waste); White Mts. R. R. v. Bay State Iron Co., 50 N. H. 57 (accounting in suit to redeem a pledge).

§ 307, [1] Marston v. Durgin, 54 N. H. 347, 374; B. & M. R. R. v. P. & D. R. R., 57 N. H. 200; Webber v. Gage, 39 N. H. 182.

§ 307, [2] Coe v. Winnipiseogee M. Co., 37 N. H. 254; Webber v. Gage, 39 N. H. 182; Burnham v. Kempton, 44 N. H. 78, 79, 92; Eastman v. Amoskeag M. Co., 47 N. H. 71, 78; Bassett v. Salisbury M. Co., 47 N. H. 426, 437.

§ 307, [3] Dennett v. Dennett, 43 N. H. 499, 501, 503.

§ 307, [4] Hodgman v. Richards, 45 N. H. 28.

§ 307, [5] Hibbard v. Eastman, 47 N. H. 507, 508, 93 Am. Dec. 467; Lyme v. Allen, 51 N. H. 242; Robinson v. Wheeler, 51 N. H. 384; Craft v. Thompson, 51 N. H. 536, 542.

holders to restrain the managing officers of a corporation from improper dealings with the corporate property and franchises,[6] but there is no jurisdiction of equity to restrain the collection of a tax illegally assessed and laid.[7]

§ 308. **Nuisance and Waste.**— The statute expressly mentions these heads in its enumeration of powers. The supreme court, while asserting the full equitable jurisdiction to restrain or abate nuisances of all kinds, has exercised it with great caution, and has evidently preferred to leave the injured party to his legal remedy wherever that was at all practicable.[1] The same is true concerning waste[2] and trespass.[3]

§ 309. **Creditor's Suit.**— The statute in express terms permits the "creditor's suit" by a judgment creditor whose legal remedies have been exhausted. The supreme court has sustained the full equitable jurisdiction on behalf of the judgment creditor to reach the equitable rights and estates of the debtor, or assets not subject to levy by execution or attachment, or property fraudulently assigned and transferred; and has even held that jurisdiction exists independently of the express statutory grant.[1]

§ 310. **Other Special Cases.**— In addition to the foregoing general heads of equitable cognizance, the jurisdiction has been asserted or exercised in the following cases: To remove a cloud from title by setting aside a deed of land;[1] in a suit for the partition of real estate;[2] for the establishment of a widow's dower right and the assignment of her dower;[3] to define and limit a right of way and to regulate its use;[4] in a suit by stockholders against the corporation and its managers to prevent or redress any improper dealings with the corporate property or franchises;[5] in a suit for an accounting and settlement of partnership matters;[6] to order the arrest of a party to a suit who is intending to leave the state for the purpose of avoiding the decree which will be rendered therein.[7] On the other hand, it is held that a court of equity in New Hampshire does not possess jurisdiction to entertain a suit for the administration and settlement of a decedent's estate, that subject having been intrusted to the courts of probate;[8] nor the jurisdiction to restrain the collection of a tax illegally assessed.[9]

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§ 307, [6] March v. Eastern R. R., 40 N. H. 548, 567, 77 Am. Dec. 732.

§ 307, [7] Brown v. Concord, 56 N. H. 375.

§ 308, [1] Coe v. Winnipiseogee M. Co., 37 N. H. 254; Webber v. Gage, 39 N. H. 182; Burnham v. Kempton, 44 N. H. 78, 79, 92; Eastman v. Amoskeag M. Co., 47 N. H. 71, 78; Bassett v. Salisbury M. Co., 47 N. H. 426, 437. The discussion of the doctrine in some of these cases is very elaborate and able.

§ 308, [2] Dennett v. Dennett, 43 N. H. 499, 501, 503.

§ 308, [3] Hodgman v. Richards, 45 N. H. 28.

§ 309, [1] Bay State Iron Co. v. Goodall, 39 N. H. 223, 230; Sheafe v. Sheafe, 40 N. H. 516, 518; Treadwell v. Brown, 44 N. H. 551.

§ 310, [1] Downing v. Wherrin, 19 N. H. 9, 91, 49 Am. Dec. 139.

§ 310, [2] Whitten v. Whitten, 36 N. H. 326, 332.

§ 311. **Massachusetts: General Extent and Nature — The Statutory Construction.**— The courts of Massachusetts originally possessed the narrowest possible equitable jurisdiction; and the legislation successively enlarging the scope of their equitable powers has, until within a few years past, been very gradual and exceedingly cautious. The earliest statute of 1798, chapter 77, conferred an authority only in cases of foreclosure or redemption of mortgages. In the Laws of 1817, chapter 87, the legislature gave to the supreme court jurisdiction in equity over "all cases of trust arising under deeds, wills, or in the settlement of estates, and all cases of contract in writing, where a party claims the specific performance of the same, and in which there may not be a plain, adequate, and complete remedy at law." Other statutes were passed, and additional powers were given, enlarged, or modified in the Revised Statutes of 1830, and in 1851, 1853, 1855, 1857, and 1858, until the various provisions were completed which are collected and condensed in chapter 113, section 2, of the Revised Statutes of 1873, quoted in the preceding section.[1] Finally, by the Laws of 1877, chapter 178, the last subdivision of said chapter 113, section 2, of the Revised Statutes, which reads, "And shall have fully equity jurisdiction according to the usage and practice of courts of equity, in all other cases where there is not a plain, adequate, and complete remedy at law," was repealed, and instead thereof was substituted the following most comprehensive provision: "The supreme judicial court shall have jurisdiction in equity of all cases and matters of equity cognizable under the general principles of equity jurisprudence; and in respect of all such cases and matters shall be a court of general equity jurisdiction."

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[3] Norris v. Morrison, 45 N. H. 490.

[4] Bean v. Coleman, 44 N. H. 539, 547.

[5] March v. Eastern R. R., 40 N. H. 548, 567, 77 Am. Dec. 732.

[6] Treadwell v. Brown, 41 N. H. 12.

[7] Samuel v. Wiley, 50 N. H. 353–355.

[8] Walker v. Cheever, 35 N. H. 339, 349.

[9] Brown v. Concord, 56 N. H. 375.

§ 312. The language of this last enactment seems to be as strong, in its grant of powers, as any which could possibly be used. There can be no reasonable doubt that under it a complete equitable jurisdiction commensurate in its nature and extent with that held by the English court of chancery is conferred upon the supreme judicial court,— a jurisdiction absolutely unrestricted and unlimited save by the principles inherent in the system of equity jurisprudence itself,[a] and except, perhaps, with respect to some particular matters, by positive mandatory provisions of other statutes of the state.[1] The supreme judicial court is now a tribunal of general equitable powers and functions. It seems to be wholly unnecessary, therefore, to examine the course of past decision and the judicial interpretation put upon the prior series of statutes for the purpose of ascertaining the

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§ 311, [1] See *ante,* in note under § 286.

§ 312, [1] As an illustration of my meaning, it may very well be held, as it is in many other states, that, notwithstanding this sweeping grant of a general equitable jurisdiction, the ordinary jurisdiction over administrations and the settlement of decedents' estates is exclusively given by other statutes to the courts of probate.

(a) So held in numerous recent cases. See Parker v. Simpson, 180 Mass. 334, 62 N. E. 401 (a full historical review of the jurisdiction in Massachusetts); Niles v. Graham, 181 Mass. 41, 62 N. E. 986; Gorgam v. Pope (Mass.), 69 N. E. 343.

amount of equitable jurisdiction at present established in Massachusetts. The act of 1877 has swept away the results of more than a half-century of careful judicial labor. It is very important, however, to examine this course of past decision, and to state in a summary manner the interpretation given to the prior statutes, in order to show the value of the decisions themselves — many of them most able, elaborate, and learned — as precedents, to discover their probable bearing upon the future development of equity within the state, and to understand their relations with the general system of equitable jurisdiction and jurisprudence throughout the entire country. Unless the methods of interpretation and of dealing with their equitable powers pursued by the Massachusetts judges were described, and the restrictive effects necessarily produced by the former legislation were explained, many of these decisions would be exceedingly misleading as authorities upon the powers and doctrines of equity in other states. I purpose, therefore, to exhibit, in a very condensed and summary form, the course and results of the judicial interpretation put upon the prior statutory grants of jurisdiction.

§ 313.[a] The following single principle lies at the basis of and explains this entire course of interpretation, and separates the decisions made in it from the equitable system prevailing in any other state except Maine. It has been constantly asserted that the courts of Massachusetts possess no inherent equitable functions and authority whatsoever, but are, in their original creation and endowment, purely common-law tribunals; that all the equitable powers which they hold are those conferred by the express terms of some statute; that all these statutory grants have been coupled with the condition that such powers shall only exist in cases where there is no plain, adequate, and certain remedy at law, and this clause, instead of being merely formal, is the very test and criterion of the jurisdiction,

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(a) This paragraph of the text is cited in Moulton v. Smith, 16 R. I. 126, 27 Am. St. Rep. 728, 12 Atl. 891.

limiting and restricting it on all sides, and applying not simply to the remedies known to the ancient common-law system of procedure, but to those legal remedies from time to time created and furnished by the state legislation. In giving effect to the statutes, the strictest mode of interpretation has been uniformly adopted. In following out the policy assumed to have been intended by the legislature, it has been settled that the courts took no powers nor jurisdiction over any equitable right or to administer any equitable remedy, except those plainly permitted by the express and positive language of the statutes; and that this language could never be enlarged by judicial construction, so as to include and confer by implication any authority which was not thus expressly mentioned in the terms used by the legislature. This restrictive method of interpretation has been pursued without any exception, and has sometimes produced very strange results. Over all these express grants extends the clause limiting their operation to cases in which there is no adequate remedy at law. In dealing with this clause the courts have followed a course directly opposed to that adopted by the national judiciary, and have given the strongest effect to its restrictive words. As a necessary result of this judicial action, the equitable jurisdiction and jurisprudence of Massachusetts have been fragmentary in form, and curtailed and limited in every portion and with respect to every kind of subject-matter, unlike the equitable system prevailing in England or in most of the other states.[1] This peculiar character will doubtless be changed in the future. To the general description thus given of the jurisdiction as it depended upon the former statutes, I shall add very briefly the results which have been reached with respect to some of the most important subject-matters of equitable cognizance.

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[1] The following cases are given as examples of the mode of interpretation, and illustrations of the principle described in the text, selected from several important heads of the equitable jurisprudence: Kelleran v. Brown, 4 Mass. 443 (equitable mortgage); Dwight v. Pomeroy, 17 Mass. 302, 324, 327, 9 Am. Dec. 148, per Parker, C. J. (specific performance of contract); Putnam v. Putnam, 4 Pick. 139–141, per Parker, C. J. (bill of revivor to redeem a mortgage); Black v. Black, 4 Pick. 234, 236, per Parker, C. J. (implied or constructive trust); Jones v. Boston Mill Corp'n, 4 Pick. 507, 509, 511, 512, per Parker, C. J. (specific performance of an award); Hunt v. Maynard, 6 Pick. 489 (redeeming a mortgage); Campbell v. Sheldon, 13 Pick. 8 (lost deeds and trusts created by foreign wills); Dimmock v. Bixby,

§ 314. **Specific Performance.**— The power to decree the specific execution of written contracts was given by an early statute, and the provisions contained in the revision of 1873,

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20 Pick. 368, 372 (assignment for the benefit of creditors); Wright v. Dame, 22 Pick. 55, 60, per Wilde, J. (implied trust); Eaton v. Green, 22 Pick. 526, 529, 531, per Wilde, J. (equitable mortgage); Whitney v. Stearns, 11 Met. 319 (fraud and trust); Clarke v. Sibley, 13 Met. 210 (equitable mortgage or lien); Parker v. May, 5 Cush. 336, 341 (charitable trusts); Jacobs v. Peterborough, etc., R. R. Co., 8 Cush. 223, 225 (specific performance of a verbal contract for the sale of land); Bowditch v. Banuelos, 1 Gray, 220, 228, per Shaw, C. J. (trusts arising from a deed); Harvard Coll. v. Society for Promoting Theol. Education, 3 Gray, 280, 282, per Dewey, J. (charitable trusts); Treadwell v. Cordis, 5 Gray, 341, 348, per Shaw, C. J. (construction of a will with trusts); Old Colony R. R. Co. v. Evans, 6 Gray, 25, 30, per Dewey, J. (specific performance of a contract); Sanborn v. Sanborn, 7 Gray, 142 (specific performance of a verbal contract for the sale of land); Miller v. Goodwin, 8 Gray, 542 (specific performance against heirs and administrator of deceased vendor); Campbell v. Wallace, 10 Gray, 162, 163, per Thomas, J. (trusts created by a foreign will); Buck v. Dowley, 16 Gray, 555, 557, per Chapman, J. (specific performance of a verbal contract, and enforcement of parol trusts); Brown v. Evans, 6 Allen, 333, 336, per Merrick, J. (specific enforcement of an award); Drury v. Inhabitants of Natick, 10 Allen, 169, 175 (charitable trusts); Jackson v. Phillips, 14 Allen, 539, 593 (charitable trusts); Bassett v. Brown, 100 Mass. 355 (no jurisdiction at suit of defrauded grantor to set aside a conveyance of land obtained by fraud); Carlton v. City of Salem, 103 Mass. 141 (suit by taxable inhabitants to restrain municipal officers from illegal acts); Suter v. Matthews, 115 Mass. 253 (no concurrent jurisdiction in equity over cases of fraud where there is an adequate remedy at law); Jones v. Newhall, 115 Mass. 244, 247, 15 Am. Rep. 97, per Wells, J. (no jurisdiction to compel the specific performance of a contract at a suit of the vendor when the only substantial relief would be the recovery of the purchase price, the remedy at law being held adequate); Frue v. Loring, 120 Mass. 507 (no jurisdiction to recover an amount of money alleged to be due in consequence of an implied trust, the remedy at law being adequate). I have purposely arranged these cases in the order of their dates, rather than according to their subject-matters, so that the method of interpretation running through them might be the more clearly shown. It will be seen that in the very latest ones of the series, decided after the powers of the court had been so much enlarged by successive statutes, the principle of interpretation concerning the equitable jurisdiction stated in the text was asserted with even greater emphasis than in the earlier cases.

quoted in the preceding section, confer this particular jurisdiction in ample terms. The courts have therefore had no difficulty in decreeing the specific execution of written contracts in accordance with the settled doctrines of equity jurisprudence between the original parties,[1] and in favor of an assignee of the vendee against the vendor,[2] and in favor of the heirs and administrator of a deceased vendee, or against the heirs and administrator of a deceased vendor.[3] The jurisdiction did not, however, include the specific execution of awards,[4] nor of verbal contracts for the sale of land on the ground of part performance.[5] In one of the recent cases it was held, after a very elaborate examination of the legislative system and policy, that there was no jurisdiction to decree the specific performance of a contract on behalf of the vendor when the only substantial relief to be obtained was the payment of the purchase-money by the vendee.[6]

§ 315. **Trusts.**— The statute of 1817 gave power to the supreme court to determine in equity "all cases of trust arising under deeds, wills, or in the settlement of estates."

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[1] Dwight v. Pomeroy, 17 Mass. 302, 327, 9 Am. Dec. 148; Salisbury v. Bigelow, 20 Pick. 174; Hilliard v. Allen, 4 Cush. 532, 535; Old Colony R. R. Co. v. Evans, 6 Gray, 25, 30, 66 Am. Dec. 394; Boston & Me. R. R. v. Bartlett, 10 Gray, 384.

[2] Currier v. Howard, 14 Gray, 511.

[3] Reed v. Whitney, 7 Gray, 533; Miller v. Goodwin, 8 Gray, 542; Davis v. Pope, 12 Gray, 193, 197; Bell v. City of Boston, 101 Mass. 506, 511.

[4] Jones v. Boston Mill Corp'n, 4 Pick. 507, 512; Brown v. Evans, 6 Allen, 333, 336; Howe v. Nickerson, 14 Allen, 400, 406.

[5] This ruling was placed upon the ground that the express terms of the statute only mentioned written contracts; and the court refused to exercise any enlarged powers by implication from other heads of the statutory jurisdiction: Dwight v. Pomeroy, 17 Mass. 302, 9 Am. Dec. 148; Jacobs v. Peterborough, etc., R. R., 8 Cush. 223, 225; Sanborn v. Sanborn, 7 Gray, 142; Buck v. Dowley, 16 Gray, 555, 557.

[6] Jones v. Newhall, 115 Mass. 244. In this opinion the statutory restriction to cases where there is no adequate remedy at law was applied with great stringency and in a very general manner. And there is no jurisdiction to compel the specific performance by the vendee of an agreement to purchase certain stocks: Noyes v. Marsh, 123 Mass. 286; citing Thorndike v. Locke, 98 Mass. 340; Somerby v. Buntin, 118 Mass. 279, 287, 19 Am. Rep. 459; Jones v. Newhall, 115 Mass. 244; nor to enforce an agreement to submit matters to arbitration: Pearl v. Harris, 121 Mass. 390.

This language was afterwards enlarged into the provision contained in the revision of 1873, quoted in the preceding section: "Suits and proceedings for the enforcing and regulating the execution of trusts, whether the trusts relate to real or personal estate." Under the first of these statutes the equitable powers of the courts were exceedingly narrow. They held that their jurisdiction embraced only trusts expressly created by the terms of a will or deed, and they refused to extend it by implication to resulting, constructive, and implied trusts, or even to those created by foreign wills.[1] By the second form of the statute, the jurisdiction over this subject was, of course, greatly enlarged. It embraced not only cases of ordinary express trusts created by the terms of a deed or will, but assignments for the benefit of creditors, charitable trusts, and resulting, implied, or constructive trusts, as recognized by the doctrines of equity jurisprudence. The court exercised a power to compel the due performance of a trust at the suit of the beneficiary, and to give construction to an instrument creating a trust, and to define the nature of a trust, and direct the trustees in the discharge of their fiduciary duties, and to appoint trustees. But still the jurisdiction was held not to be commensurate in its extent with that general power over trusts belonging to the unlimited system of equity jurisprudence, and possessed by the English court of chancery. The statutory grant was restricted by the clause confining its operation to cases where there was no adequate remedy at law. The Massachusetts courts have therefore denied the existence of an equitable jurisdiction even in cases of trust, where the substantial relief would be the payment of money due under a trust relation, which could be recovered by an action at law for money had and received.[2]

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[1] Black v. Black, 4 Pick. 234, 236 (implied and resulting trusts); Hunt v. Maynard, 6 Pick. 489 (no trust created by a mortgage in favor of the mortgagor); Campbell v. Sheldon, 13 Pick. 8 (trust created by a foreign will).

[2] Dimmock v. Bixby, 20 Pick. 368, 372 (assignment for the benefit of creditors); Wright v. Dame, 22 Pick. 55; National Mahaiwe Bank v. Barry,

§ 316. **Mortgages.**— The earliest grant of an equitable jurisdiction, continued in the General Laws of 1873, provides merely for the redemption and foreclosure of mortgages, although a later statute adds "cases of the conveyance or transfer of real estate in the nature of mortgage." It has been decided that the former of these clauses is confined in its operation to mortgage deeds by which the legal estate is conveyed to the mortgagee according to the common-law theory; and the court has repeatedly denied the existence, by implication from this or other statutory grants, of any jurisdiction to enforce or redeem equitable mortgages or equitable liens.[1] Of the power to redeem or

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125 Mass. 20 (implied trust); Parker v. May, 5 Cush. 336; Harvard College v. Society for Theological Education, 3 Gray, 280, 282; Drury v. Inhabitants of Natick, 10 Allen, 169; Jackson v. Phillips, 14 Allen, 539, 593 (charitable trusts); Sears v. Hardy, 120 Mass. 524 (resulting trust). The following are cases of express trusts under a deed or will, or of the construction of a will creating trusts: First Congregational Society v. Trustees, etc., 23 Pick. 148; Hooper v. Hooper, 9 Cush. 122, 127; Bowditch v. Banuelos, 1 Gray, 220, 228, per Shaw, C. J.; Treadwell v. Cordis, 5 Gray, 341, 348; Russell v. Loring, 3 Allen, 121, 125, per Dewey, J. But under this statutory grant it was held that there was no jurisdiction over a case of fraudulent conveyance of his land by a debtor on the ground of a resulting or constructive trust arising therefrom in favor of the defrauded creditors: Whitney v. Stearns, 11 Met. 319; nor a jurisdiction to enforce a mere equitable lien or mortgage on the ground of an implied trust: Clarke v. Sibley, 13 Met. 210; nor to enforce performance of an express trust created by a foreign will: Campbell v. Wallace, 10 Gray, 162, 163; nor to enforce a parol trust: Buck v. Dowley, 16 Gray, 555, 557. Finally, in Frue v. Loring, 120 Mass. 507, the court decided that there was no equitable jurisdiction to recover an amount of money, where the liability grew out of a trust or trust relation, since the legal remedy by action for money had and received was adequate. Under its general jurisdiction over trusts the court may appoint a trustee, although no express provision for an appointment is made by the statute, nor is contained in the instrument creating the trust: In re Eastern R. R., 120 Mass. 412; citing Bowditch v. Banuelos, 1 Gray, 220, 228; Bailey v. Kilburn, 10 Met. 176, 43 Am. Dec. 423; Winslow v. Cummings, 3 Cush. 358; Felch v. Hooper, 119 Mass. 52; Parker v. Parker, 118 Mass. 110; Ellis v. Boston, H. & E. R. R., 107 Mass. 1; and see also Attorney-General v. Barbour, 121 Mass. 568.

[1] Kelleran v. Brown, 4 Mass. 443, 444, per Parsons, C. J.; Eaton v. Green, 22 Pick. 526, 529, per Wilde, J.; Clarke v. Sibley, 13 Met. 210, 214, per Wilde, J.

to foreclose legal mortgages, there was no question.[2] This narrow jurisdiction has, beyond a doubt, been enlarged by the later enactment above mentioned. Thus it is held that the court may, in a proper equitable suit for that purpose, declare a deed of land absolute on its face to be a mortgage, and decree a redemption and reconveyance.[3]

§ 317. **Creditors' Suits.**— The power to aid creditors in reaching the property of their debtors is given by the statute in very broad terms. In addition to the ordinary "creditors' suits" by judgment creditors whose executions have been returned unsatisfied, for the purpose of reaching equitable assets or impeaching fraudulent transfers, it is held that a suit may be maintained by a creditor to reach any property, interest, or right, legal or equitable, of his debtor, which cannot be come at so as to be attached or taken on execution, even though the complainant has not exhausted his legal remedies, nor put his demand into the form of a judgment.[1]

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[2] Saunders v. Frost, 5 Pick. 259, 267, 16 Am. Dec. 394, per Parker, C. J.; Boyden v. Partridge, 2 Gray, 190 (suit to redeem a mortgage and to set aside a release of the equity of redemption obtained by fraud); Shaw v. Norfolk Co. R. R., 5 Gray, 162, 182 (foreclosure of a railroad mortgage); Putnam v. Putnam, 4 Pick. 139, 140, per Parker, C. J. (redeeming a mortgage by a bill of revivor).

In King v. Bronson, 122 Mass. 122, the jurisdiction to set aside a sale of the mortgaged premises made under a power of sale contained in the mortgage, and to redeem, was fully admitted, but the relief was refused on the facts. Where a mortgage is given to secure an indebtedness arising from an agreement illegal, as being in violation of the bankrupt law and in fraud of other creditors, the mortgage itself is also tainted with the illegality, and the mortgagee can maintain no suit to redeem a prior mortgage: Blasdel v. Fowle, 120 Mass. 447, 21 Am. Rep. 533. With respect to the foreclosure and redemption of mortgages of personal property under the Massachusetts statutes, see Burtis v. Bradford, 122 Mass. 129, 131; Bushnell v. Avery, 121 Mass. 148; Boston, etc., Iron Works v. Montague, 108 Mass. 248.

[3] Hassam v. Barritt, 115 Mass. 256. The relief was refused on the facts, but the jurisdiction was fully admitted.

[1] Bresnihan v. Sheehan, 125 Mass. 11 (1878). A wife secretly accumulated her husband's wages placed in her hands for safe-keeping, and used the amount, with other money of her own, in the purchase of a piece of land, taking the title in her own name. Held, that the husband had an equitable interest in the land, and a creditor could maintain the suit described in the text. Colt, J., said: "A creditor may maintain a bill in equity to

§ 318. **Fraud.**— For a considerable time there was no statutory grant of any jurisdiction expressly on the ground of fraud; but subsequently the provision was adopted in broad terms, which is now found in the General Laws of 1873, namely, "cases of fraud." Prior to this statute, the courts uniformly denied the existence of an authority to administer equitable rights or remedies directly growing out of fraud, and they only dealt with fraud as it arose incidentally in cases belonging to some other head of equitable jurisdiction.[1] Full jurisdiction was undoubtedly given by the subsequent statute in "cases of fraud;" but the qualifications stated in a former paragraph concerning "trusts" will apply to it with equal force. The exercise of the jurisdiction has been limited by the clause so often quoted, and the courts have, until quite recently, shown a strong tendency to confine it within narrow bounds.[2]

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reach any property, right, title, or interest, legal or equitable, of the debtor which cannot be come at to be attached or taken on execution. He may thus reach the equitable assets of his debtor without having exhausted his remedies at law or reduced his claim to a judgment;" citing Tucker v. McDonald, 105 Mass. 423. With respect to "creditors' suits," ordinarily so called, Trow v. Lovett, 122 Mass. 571, decides that a judgment creditor who has not issued an execution does not by filing a creditor's bill under the statute of 1875 (General Laws, quoted in preceding section), to reach land fraudulently conveyed by his debtor, acquire a lien thereon. In Massachusetts a judgment does not create a lien on land. To create an equitable lien upon land of the debtor fraudulently transferred, the creditor must exhaust his legal remedies, or must at least issue an execution: Wiggin v. Heywood, 118 Mass. 514; the same rule as that laid down in Beck v. Burdett, 1 Paige, 305, 19 Am. Dec. 436; Crippen v. Hudson, 13 N. Y. 161; Jones v. Green, 1 Wall. 330.

In Massachusetts, land conveyed away by a debtor in fraud of his creditors can be attached and taken on execution. Prior to the act of 1875, above mentioned, this was the only mode of reaching such property, and there was no jurisdiction to maintain a suit in equity, on behalf of a creditor, to enforce his demand against the lands: Taylor v. Robinson, 7 Allen, 253; Mill River Ass'n v. Claflin, 9 Allen, 101.

[1] Boyden v. Partridge, 2 Gray, 190. And see other cases cited *ante*, in note under § 313; Woodman v. Saltonstall, 7 Cush. 181; Thayer v. Smith, 9 Met. 469.

[2] Jurisdiction denied: Bassett v. Brown, 100 Mass. 355; Suter v. Matthews, 115 Mass. 253; White v. Thayer, 121 Mass. 226, 228; citing Boardman v. Jackson, 119 Mass. 161; Lewis v. Cocks, 23 Wall. 466. In Bassett

§ 319. Other Special Cases.—In addition to the foregoing important branches of equity jurisprudence, the following are some of the other subjects over which the statutory jurisdiction has been exercised, although the courts have, in every instance, steadily adhered to the principle that no equitable jurisdiction existed in cases where an adequate remedy could be obtained by an action or proceeding at law. The jurisdiction has been upheld, in this somewhat guarded manner, to restrain or abate nuisances of various kinds;[1]

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v. Brown, 100 Mass. 355, and White v. Thayer, 121 Mass. 226, 228, it was held that there was no jurisdiction of a suit on behalf of the grantor to set aside a deed of land procured from him by fraud, since the land could be recovered by an action at law,—a writ of entry; and in Suter v. Matthews, 115 Mass. 253, the court laid down the general doctrine that there was no concurrent equitable jurisdiction in cases growing out of fraud where the remedy at law was adequate, and therefore a suit could not be maintained to recover money obtained through fraud.

Jurisdiction exercised: Gilson v. Hutchinson, 120 Mass. 27; Cheney v. Gleason, 125 Mass. 166; Smith v. Everett, 126 Mass. 304; Fuller v. Percival, 126 Mass. 381. In Gilson v. Hutchinson, 120 Mass. 27, a husband had conveyed his land without consideration and on a secret verbal trust to defendant, for the purpose of defrauding his wife of her dower, and died before obtaining a reconveyance. His widow was appointed administratrix, and at her suit the transfer to the defendant was set aside and the title vested in the husband's heirs. In Cheney v. Gleason, 125 Mass. 166, the plaintiff, through fraud of an agent, had been induced to convey his land to A, who was privy to the fraud, and to take in payment certain securities which were worthless. The land having been again conveyed to B, an innocent purchaser, the court sustained a suit by the plaintiff to reach a mortgage for the purchase price given back by B to A, and for damages. In Smith v. Everett, 126 Mass. 304, the defendant, by fraudulent representations, procured the plaintiff to enter into a copartnership for a definite period. Held, that the court had jurisdiction to decree a cancellation of the partnership agreement, and to enjoin the defendant from using the firm name; and having thus obtained jurisdiction of the case, it would give full relief by ordering a repayment of all moneys advanced or expended by the plaintiff on account of the firm. In Fuller v. Percival, 126 Mass. 381, a promissory note having been obtained by fraud, a suit by the defrauded maker was sustained to enjoin the payee from transferring the note, and to compel its surrender and cancellation. The court, by these decisions, has certainly shown a much more liberal tendency in the exercise of its jurisdiction.

[1] Such as interferences with water rights, rights of way, and other easements or servitudes: Jenks v. Williams, 115 Mass. 217; Cadigan v. Brown, 120 Mass. 493; Atlanta Mills v. Mason, 120 Mass. 244; Breed v. City of Lynn, 126 Mass. 367; Tucker v. Howard, 122 Mass. 529; Woodward v. City of Worcester, 121 Mass. 245.

to grant the remedy of injunction in a variety of circumstances,— as, for example, to restrain nuisances and other such tortious acts, to prevent the violation of contracts, to prevent the use and transfer of securities fraudulently obtained, and to prevent the accomplishment of other fraudulent transactions; to restrain actions or judgments at law;[2] in suits for an accounting under the strict limitation that an accounting in equity is really necessary, because no adequate remedy can be obtained at law;[3] to reform deeds and other written instruments in which there was a mutual mistake as to some matter of fact.[4] Other instances in which the jurisdiction has been exercised under special circumstances or for special reliefs are collected in the foot-note.[5]

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[2] The remedy of injunction seems to have been used by the Massachusetts courts with some freedom. To restrain private nuisances: Jenks v. Williams, 115 Mass. 217; Cadigan v. Brown, 120 Mass. 493; Atlanta Mills v. Mason, 120 Mass. 244; Woodward v. Worcester, 121 Mass. 245; Tucker v. Howard, 122 Mass. 529; Breed v. Lynn, 126 Mass. 367; to restrain unlawful use of water-power by a mill-owner: Agawam Canal Co. v. Southworth Mfg. Co., 121 Mass. 98; to prevent a violation of a contract by which defendant had sold his stock in trade and good-will to the plaintiff, and had agreed not to carry on the same business at the same place, under a liability for one thousand dollars as liquidated damages in case of a breach: Ropes v. Upton, 125 Mass. 258; citing Angier v. Webber, 14 Allen, 211, 92 Am. Dec. 748; Dwight v. Hamilton, 113 Mass. 175; Boutelle v. Smith, 116 Mass. 111; to restrain the transfer of negotiable instruments obtained by fraud: Fuller v. Percival, 126 Mass. 381; citing Hamilton v. Cummings, 1 Johns. Ch. 517; Commer. Ins. Co. v. McLoon, 14 Allen, 351; Martin v. Graves, 5 Allen, 601; to restrain a fraudulent use of plaintiff's name as a partner: Smith v. Everett, 126 Mass. 304; to restrain an unlawful use of plaintiff's trade-mark or an imitation thereof: Gelman v. Hunnewell, 122 Mass. 139 (the opinion in this case contains an elaborate discussion of the law concerning trade-marks, with a full citation of authorities); to prevent the use of a mistaken deed, and to restrain an action at law to recover on its covenants: Wilcox v. Lucas, 121 Mass. 21.

[3] Badger v. McNamara, 123 Mass. 117, 119. The jurisdiction in this case was denied upon the facts, Gray, C. J., stating the rule as follows: "In order to maintain a bill in equity for an accounting, it must appear from the *specific* allegations that there was a fiduciary relation between the parties, *or* that the account is so complicated that it cannot be conveniently taken in an action at law. The *general* allegation that the account is of such a character is not sufficient to sustain the jurisdiction in Massachusetts;" citing Frue v. Loring, 120 Mass. 507; Blood v. Blood, 110 Mass. 545; Fowle v. Lawrason, 5 Pet. 495; Dinwiddie v. Bailey, 6 Ves. 136; Foley v. Hill, 2 H. L. Cas. 28; Smith v. Leveaux, 2 De Gex, J. & S. 1; Moxon v. Bright, L. R. 4 Ch. 292. This suit was brought by a consignor of goods sent to be sold against the commission merchant for an account of the proceeds, and especially of the commissions retained; and it was held that the case was wholly unlike suits between partners or persons between whom accounts are settled in the same manner as those of partners, requiring

§ 320. Many important subjects, in respect of which the equitable jurisdiction has been denied, are mentioned in the foregoing paragraphs. It has also been decided that a court of equity either has no jurisdiction, or will not exercise any, under the following circumstances, or for the fol-

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mutual charges and credits, as in Bartlett v. Parks, 1 Cush. 82; Hallett v. Cumston, 110 Mass. 32. No suit for an accounting growing out of a business or trading or transaction in which the parties were engaged which is illegal: Snell v. Dwight, 120 Mass. 9; Dunham v. Presby, 120 Mass. 285.

[4] Reforming a mistaken deed: Wilcox v. Lucas, 121 Mass. 21; citing Glass v. Hulbert, 102 Mass. 24; 3 Am. Rep. 418; Jones v. Clifford, L. R. 3 Ch. Div. 792. But there is no equitable jurisdiction to recover back money paid through mistake; as where the grantee, through a mistake as to the amount, had paid too large a sum of purchase-money, it was held that no suit in equity could be maintained to recover back the excess, since the remedy at law by an action for money had and received was ample: Pickman v. Trinity Church, 123 Mass. 1, 25 Am. Rep. 1.

[5] Cases "where there are more than two parties having distinct rights or interests which cannot be justly decided in one action at law": Gen. Laws 1873, chap. 113, § 2, subd. 6; Carr v. Silloway, 105 Mass. 543, 549; Hale v. Cushman, 6 Met. 425; and see McNeil v. Ames, 120 Mass. 481. When a suit in equity will or will not be retained to assess and decree payment of the plaintiff's damages, the special relief demanded being impracticable: Milkman v. Ordway, 106 Mass. 232; Tainter v. Cole, 102 Mass. 162. Where the plaintiff was owner of certain shares of the stock of a corporation, and the certificate thereof was, without his fault, fraudulently transferred by means of a forged power of attorney, and was surrendered, and a new certificate issued by the corporation to the purchaser, such original owner may maintain a suit in equity against the corporation, and may obtain a decree compelling it to procure a like number of shares of its own stock, and to issue a certificate therefor to the plaintiff, and to pay him all the dividends which have accrued thereon in the meantime: Pratt v. Boston, etc., R. R. Co., 126 Mass. 443; citing Pratt v. Taunton Copper Co., 123 Mass. 110, 25 Am. Rep. 37; Machinists' Nat. Bank v. Field, 126 Mass. 345; Salisbury Mills v. Townsend, 109 Mass. 115; Loring v. Salisbury Mills, 125 Mass. 138; Telegraph Co. v. Davenport, 97 U. S. 369; Duncan v. Luntley, 2 Macn. & G. 30, 2 Hall & T. 78; Taylor v. Midland R'y Co., 28 Beav. 287; 8 H. L. Cas. 751; Holbrook v. New Jersey Zinc Co., 57 N. Y. 616. When a suit may or may not be maintained for the purpose of enforcing an equitable set-off: Spaulding v. Backus, 122 Mass. 553, 23 Am. Rep. 391 (the opinion contains an elaborate discussion of the doctrine, with a full citation and review of the authorities).

lowing purposes: Over lost deeds;[1] in suits brought by individual inhabitants or tax-payers to compel the performance of a public duty by a municipal corporation, or by its officers; nor to restrain the collection of a tax on the ground of its illegality;[2] in administration suits, unless under special circumstances;[3] in suits brought by the assignee of a legal thing in action to recover the amount due upon such demand, where an action at law can be maintained in the name of the assignor;[4] and in other instances collected in the foot-note.[5]

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[1] "This court has no equity jurisdiction in cases of lost deeds, independently of some other ground of equity jurisdiction": Campbell v. Sheldon, 13 Pick. 8.

[2] Carlton v. City of Salem, 103 Mass. 141. And see Attorney-General v. Salem, 103 Mass. 138. (This case construes the statute (Gen. Stats., chap. 18, § 79), which gives authority to the court to interfere under special circumstances at the suit of not less than ten taxable inhabitants, and to restrain the illegal acts of municipal authorities in the matter of taxation or creating a public debt, but restricts the operation of the statute to the exact condition of facts mentioned by it; any such jurisdiction, independently of the statute, is emphatically denied). No suit in equity can be maintained by a trustee against two towns to determine in which one of them he is taxable: Macy v. Nantucket, 121 Mass. 351; and there is no jurisdiction in equity to determine whether or to whom a tax is due, nor to restrain its collection. The only remedy for an illegal tax is for the persons to pay it, and sue the town or city at law, in order to recover it back: Loud v. Charlestown, 99 Mass. 208; Norton v. Boston, 119 Mass. 194.

[3] There is no equitable jurisdiction to compel an administrator to account or for the final accounting and settlement of decedents' estates, except under special circumstances, where adequate relief cannot be obtained in the court of probate: Wilson v. Leishman, 12 Met. 316. The court said: "It was not the intention of the legislature, by conferring equity powers upon this court, to take away or to intrench upon the jurisdiction of the probate court in the settlement of estates, but distinctly to enable this court, among other things, to enforce and regulate the execution of trusts, whether relating to real or personal estate." After showing that all the facts of this case came within the express powers conferred upon the probate court, and all the relief asked, both of an accounting and of a discovery of moneys concealed by the widow, could be effectually given by that tribunal, the opinion adds: "It is true that this court is expressly authorized to hear and determine in equity 'all suits and proceedings for enforcing and regulating the execution of trusts, whether the trust relate to real or personal estate.' It is also true that a court having general equity jurisdiction will treat, as a trustee, an administrator who has property in his hands for the parties entitled according to the statutes of distribution, on the ground that the property thus held is a trust, and the enforcing of a distribution of it is the execution of a trust." But this latter branch of the jurisdiction over trusts is not possessed by the courts of Massachusetts as a part of their limited equitable powers; it has been expressly conferred upon the probate courts, and will not be assumed nor exercised by means of any enlarged interpretation put upon the language of the statutes. See also Southwick

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v. Morrell, 121 Mass. 520; Sykes v. Meacham, 103 Mass. 285. A creditor cannot maintain a suit in equity against the administrator of his debtor, to recover a debt barred by the statute of limitations, on the ground that he was a non-resident alien, and did not learn of the debtor's death, etc.

[4] A court of equity will not entertain a bill in equity by the assignee of a strictly legal right, merely upon the ground that he cannot bring an action at law in his own name, nor unless it appears that the assignor prohibits and prevents such action being brought in *his* name, or that an action in the assignor's name would not afford the assignee an adequate remedy: Walker v. Brooks, 12 Mass. 241; citing Hammond v. Messinger, 9 Sim. 327, 332, per Shadwell, V. C. The contrary rule as stated by Judge Story in Eq. Jur., § 1057a, and in Eq. Pl., § 153, is shown to be erroneous. See the elaborate discussion and review of the decisions in the opinion at pages 244-248.

[5] Equitable jurisdiction does not extend to cases of libel or slander, or false representation as to the character or quality of plaintiff's property, or as to his title thereto, which involves no breach of trust or of contract. The plaintiff's bill alleged no trust nor contract, nor use of plaintiff's name, but only that defendant had made false and fraudulent representations, oral and written, that the articles manufactured by plaintiff were an infringement of defendant's patent rights, and that plaintiff had been sued by defendant therefor, and that defendant had threatened with suit divers persons who had purchased plaintiff's said articles, praying an injunction, etc. Held, that there was no equitable jurisdiction in such a case; the jurisdiction in cases of trade-mark rests upon the right of property therein: Boston Diatite Co. v. Florence Manufacturing Co., 114 Mass. 69, 19 Am. Rep. 310; Whitehead v. Kitson, 119 Mass. 484; citing Gee v. Pritchard, 2 Swanst. 402, 413; Seeley v. Fisher, 11 Sim. 581, 583; Fleming v. Newton, 1 H. L. Cas. 363, 371, 376; Emperor of Austria v. Day, 3 De Gex, F. & J. 217, 238-241; Mulkern v. Ward, L. R. 13 Eq. 619. The opinion of Malins, V. C., in Springhead Spin. Co. v. Riley, L. R. 6 Eq. 551, Dixon v. Holden, L. R. 7 Eq. 488, and Rollins v. Hinks, L. R. 13 Eq. 355, was expressly criticised and rejected. There is no jurisdiction to compel a lessee, whose term has been sold on execution, to deliver up to the purchaser — the plaintiff — the counterparts of his lease and subleases which are recorded, and there is no jurisdiction under General Laws, chap. 113, § 2, subd. 6, of a suit by an assignee in law of the lessee's estate against the lessee who claims rent from a subtenant: McNeil v. Ames, 120 Mass. 481. In a suit for discovery and relief, even if discovery be obtained, the relief will not be granted when the plaintiff has an adequate remedy at law: Ward v. Peck, 114 Mass. 121, 122. Gray, J., said: "This bill cannot be maintained for relief, because the plaintiff has a plain, adequate, and complete remedy at law by an action for money had and received." The notion that discovery can be made

§ 321. **Jurisdiction Enlarged by Recent Statute.**— The partial, and in some respects much limited, equitable jurisdiction which I have thus sketched in outline is without doubt greatly enlarged, and perhaps rendered complete, by the statute of 1877, quoted in the preceding section; and several of the cases referred to in the foregoing paragraphs or quoted in the notes might now be differently decided. Indeed, the few decisions made since that statute, although not expressly referring to its language, exhibit, as it seems to me, a very evident purpose on the part of the Massachusetts court to exercise its equitable jurisdiction in accordance with a much more liberal and comprehensive theory than that which it formerly held, and upon which it has long acted.[1] It is impossible, however, to state with any certainty the full effect of this most recent enactment.

§ 322. **Maine: General Extent and Nature — The Statutory Construction.**— The course of legislation and of judicial construction in this state, on the general subject of equity jurisdiction, has followed very clearly after that of Massachusetts. The provisions of the Massachusetts statutes have been copied almost identically by the legislature of Maine, and the methods adopted by the Massachusetts courts have been fully accepted by the judiciary of Maine. At an early day the powers of the supreme court to grant distinctively equitable relief according to the modes of chancery were extremely narrow, extending to but one or two topics of minor importance. The jurisdiction was gradually, but very cautiously, enlarged by successive acts of the legislature; and these statutes, collected, arranged, and condensed, form the chapter 77, section 5, of the revision of 1871, which is quoted in the notes of the preceding section.[1] All of the

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the foundation of a jurisdiction in cases where no jurisdiction would otherwise have existed, is plainly rejected in Massachusetts.

§ 321, [1] See, as illustrations, Bresnihan v. Sheehan, 125 Mass. 11 (1878); Ropes v. Upton, 125 Mass. 258; Cheney v. Gleason, 125 Mass. 166; Smith v. Everett, 126 Mass. 304 (1878); Fuller v. Percival, 126 Mass. 381 (1879); Pratt v. Boston, etc., R. R., 126 Mass. 443.

§ 322, [1] See *ante*, § 286, in notes.

decisions, with very few exceptions, are the judicial construction given to these legislative grants of equitable powers. This restrictive policy has recently been abandoned. In 1874 the legislature of Maine, in this also following the example of Massachusetts, by a brief enactment, but in comprehensive terms, conferred full equity jurisdiction and powers, with respect to all matters where the remedy at law is not complete and adequate.[2] We are thus relieved from the necessity of a thorough and accurate discussion of the reported decisions for the purpose of ascertaining what equitable jurisdiction is *now* held by the courts of Maine, and what are the limitations upon it. We need only to inquire in a very general manner what amount of jurisdiction has been held and exercised prior to the enlarging statute of 1874, in order that the true meaning and force of the reported cases as precedents may be apprehended, and their application to the general system of equity jurisprudence may be understood. I purpose, therefore, to describe in the briefest manner the theory of interpretation with respect to its own equitable powers uniformly acted upon by the supreme court, and to enumerate the most important heads of equity jurisdiction which it asserted and exercised under the former statutes.

§ 323. Throughout the whole series of decisions rendered in cases arising prior to the act of 1874, above mentioned, the supreme court of Maine has constantly denied the possession by itself of a full, general, equitable jurisdiction commensurate with that held by the English court of chancery; has declared that its only equitable powers were those conferred in express terms by successive statutes of the legislature; and in the interpretation of these enactments, has always insisted that their language should be strictly construed, and that no equitable powers arising by implication should be assumed or exercised. Furthermore, these legislative grants were all given under the limitation that "no adequate and certain remedy could be had at law.'' This limitation has invariably been regarded as constituting the test of the jurisdiction; and the principle seems to have been settled that even where a case came within the very terms of the statute, the equitable powers of the court could not be exercised if there was also a certain and adequate remedy at law. These conclusions are fully sustained by the decisions cited in the foot-note.[1] The very few reported decisions in cases arising since the statute of 1874 recognize the complete change in the legislative policy shown in that enactment, and seem to admit that the court is clothed by it with the full equitable jurisdiction; but the extent and limits, if any, have not yet been judicially defined.[2] I shall now describe very briefly the extent to which the important heads of jurisdiction had been settled under the former statutory system.

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[2] See *ante*, § 286, note.

§ 324. **Mortgages.**— The exceedingly cautious and restricted manner in which the court was accustomed to deal with its equitable jurisdiction is shown in the doctrines which were settled concerning mortgages. The only powers which it possessed were those given in the clause expressly relating to mortgages, and could not be enlarged by any of the other more general provisions conferring jurisdiction in cases of fraud, trusts, mistake, and the like; and even the powers thus apparently given in very terms were held to be restricted by other mandatory portions of the statutes.[1] In accordance with this view, it was settled that the court had no equitable powers to declare a deed of conveyance of land absolute on its face to be in fact a mortgage;[2] nor any power over equitable mortgages or vendor's liens either to enforce them or to redeem from them;[3] nor any power to entertain equitable suits for the foreclosure of mortgages, although jurisdiction in "cases of foreclosure" was expressly mentioned in the clause conferring equitable powers, because a proceeding for foreclosure was described and regulated by other sections of the statute.[4] Some, if not all, of these conclusions reached by the court under the former legislation must be regarded as reversed and abrogated by the statute of 1874.[5] The only substantial equitable power over mortgages possessed by the court was that of entertaining suits for a redemption;

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[1] In fact almost every equity case decided by the court is an authority for the propositions of the text, but in the following the point was distinctly presented and determined: Getchell v. Jewett, 4 Me. 350, 359, per Mellen, C. J.; Frost v. Butler, 7 Me. 225, 231, 22 Am. Dec. 199; French v. Sturdivant, 8 Me. 246, 251; Coombs v. Warren, 17 Me. 404, 408; Chalmers v. Hack, 19 Me. 124, 127; Danforth v. Roberts, 20 Me. 307; Thomaston Bank v. Stimpson, 21 Me. 195; Russ v. Wilson, 22 Me. 207, 209; Shaw v. Gray, 23 Me. 174, 178; Bubier v. Bubier, 24 Me. 42; Chase v. Palmer, 25 Me. 341; Woodman v. Freeman, 25 Me. 531, 532, 543; Pratt v. Thornton, 28 Me. 355, 366, 48 Am. Dec. 492; Baldwin v. Bangor, 36 Me. 518, 524; Farwell v. Sturdivant, 37 Me. 308; Hayford v. Dyer, 40 Me. 245; Fletcher v. Holmes, 40 Me. 364; York, etc., R. R. v. Myers, 41 Me. 109, 119; Fisher v. Shaw, 42 Me. 32; Tucker v. Madden, 44 Me. 206, 215; McLarren v. Brewer, 51 Me. 402, 407; Stephenson v. Davis, 56 Me. 73; Crooker v. Rogers, 58 Me. 339; Spofford v. B. & B. R. R., 66 Me. 51; Pitman v. Thornton, 65 Me. 469; Richardson v. Woodbury, 43 Me. 206, 210.

[2] See Rowell v. Jewett, 69 Me. 293, 303. This suit was brought to have a deed absolute and unconditional on its face declared to be a mortgage. It had been well settled by a series of former decisions that the court had no jurisdiction to grant such relief; that the case came under no species of equitable powers given to the court. This ruling, however, was not followed; the former decisions were disregarded, and the relief was granted, solely on the ground that full equitable powers were now held by the court. The discussion of the opinion opens with the following language: "Prior to the statute of 1874 *giving this court full equity* jurisdiction," etc.

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[1] See French v. Sturdivant, 8 Me. 246, 251, which describes the general jurisdiction in equity over mortgages.

[2] Richardson v. Woodbury, 43 Me. 206, 210; Thomaston Bank v. Stimpson, 21 Me. 195.

[3] Philbrook v. Delano, 29 Me. 410, 414; Thomaston Bank v. Stimpson, 21 Me. 195; Richardson v. Woodbury, 43 Me. 206, 210.

[4] The court said that the legislature could not have intended to provide for two different modes of foreclosure,— the statutory and the suit in equity, — and it therefore pronounced the clause giving equitable jurisdiction "in cases of foreclosure" to be a mere nullity: Gardiner v. Gerrish, 23 Me. 46, 48; Shaw v. Gray, 23 Me. 174, 178; Chase v. Palmer, 25 Me. 341, 345; Brown v. Snell, 46 Me. 490, 496. In Shepley v. Atlantic, etc., R. R., 55 Me. 395, 407, a special provision of a railroad mortgage in favor of the mortgagees upon a default of the mortgagors was specifically enforced.

[5] See Rowell v. Jewett, 69 Me. 293, 303. A deeed absolute on its face was held to be a mortgage, the decision being expressly placed upon the ground that now, under this statute, the court has a "full equity jurisdiction," the earlier cases and the former rule having been the results solely of a lack of equitable powers in the court.

and even that such a suit might be maintained, the plaintiff must have fully complied with certain other statutory provisions regulating the mode of redemption.[6] The court seems to have admitted its power to enforce the claim of a pledgee of personal property by an equitable suit for a foreclosure and sale of the articles pledged.[7]

§ 325. **Penalties and Forfeitures.**— The jurisdiction given in general terms by the statute to relieve from forfeitures and penalties seems to have been admitted and exercised without abridgment, according to the settled doctrines of equity jurisprudence.[1]

§ 326. **Specific Performance.**— The jurisdiction under the statute to compel the specific performance of *written* contracts for the purchase and sale of land was fully admitted and exercised wherever the terms of the agreement were such with respect to fairness, consideration, certainty, reasonableness, and the like, as to bring the case within the well-settled doctrines of equity jurisprudence; these doctrines were adopted and acted upon as regulating the jurisdiction.[1] It was held, however, that the court had no

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§ 324, [6] Pitman v. Thornton, 65 Me. 469; Shaw v. Gray, 23 Me. 174, 178; Farwell v. Sturdivant, 37 Me. 308; York, etc., R. R. v. Myers, 41 Me. 109; Richardson v. Woodbury, 43 Me. 206, 210; Thomaston Bank v. Stimpson, 21 Me. 195; Brown v. Snell, 46 Me. 490, 496. With respect to the mode of redemption, who may redeem, and the preliminaries requisite on the part of the plaintiff as prescribed by other statutory clauses, see the following cases: True v. Haley, 24 Me. 297; Cushing v. Ayer, 25 Me. 383; Pease v. Benson, 28 Me. 336; Roby v. Skinner, 34 Me. 270; Sprague v. Graham, 38 Me 328; Baxter v. Child, 39 Me. 110; Jewett v. Guild, 42 Me. 246; Mitchell v. Burnham, 44 Me. 286, 302; Stone v. Bartlett, 46 Me. 439; Stone v. Locke, 46 Me. 445; Williams v. Smith, 49 Me. 564; Crooker v. Frazier, 52 Me. 405; Wing v. Ayer, 53 Me. 138; Pierce v. Faunce, 53 Me. 351; Phillips v. Leavitt, 54 Me. 405; Randall v. Bradley, 65 Me. 43, 48; Wallace v. Stevens, 66 Me. 190; Dinsmore v. Savage, 68 Me. 191, 193; Rowell v. Jewett, 69 Me. 293; Chamberlain v. Lancey, 60 Me. 230, 233.

§ 324, [7] Boynton v. Payrow, 67 Me. 587.

§ 325, [1] Eveleth v. Little, 16 Me. 374; Gordon v. Lowell, 21 Me. 251; Marwick v. Andrews, 25 Me. 525; Downes v. Reily, 53 Me. 62; Shepley v. Atlantic, etc., R. R., 55 Me. 395, 407.

§ 326, [1] Getchell v. Jewett, 4 Me. 350, 359, per Mellen, C. J.; Stearns v. Hubbard, 8 Me. 320; Rogers v. Saunders, 16 Me. 92, 33 Am. Dec. 635; Haskell v. Allen, 23 Me. 448, 451; Bubier v. Bubier, 24 Me. 42, 47; Foss v. Haynes,

such equitable power to decree a specific performance, even though the agreement was in writing, where the remedy at law was adequate,— as, for example, where the undertaking was in the alternative, either to convey land *or* to pay a definite sum of money, not as a penalty, or where the only relief to be obtained was damages,[2]— nor the power to compel the specific performance of a *verbal* agreement for the sale of land on the ground of its part performance.[3]

§ 327. **Fraud.**— The jurisdiction to grant the equitable reliefs directly arising from frauds was fully admitted, since it was given in very general language by the statute.[1] But the court steadily refused to extend the jurisdiction over frauds by implication to other matters which were not within the express terms of some statutory grant, or for which there was an adequate remedy at law; and for this reason it denied the existence of any equitable powers in cases, even of actual fraud, where the only relief to be obtained was a recovery of damages.[2]

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31 Me. 81, 89; Hill v. Fisher, 34 Me. 143, 40 Me. 130; Fisher v. Shaw, 42 Me. 32, 40; Hull v. Sturdivant, 46 Me. 34, 41; Shepley v. Atlantic, etc., R. R., 55 Me. 395, 407; Portland, etc., R. R. v. Grand Trunk R. R. Co., 63 Me. 90, 99; Snell v. Mitchell, 65 Me. 48; Chamberlain v. Black, 64 Me. 40; Roxbury v. Huston, 37 Me. 42; against grantee of the vendor: Linscott v. Buck, 33 Me. 530, 534; Foss v. Haynes, 31 Me. 81, 89.

§ 326, [2] Contracts in the alternative: Fisher v. Shaw, 42 Me. 32; relief of damages: Haskell v. Allen, 23 Me. 448, 451; Marston v. Humphrey, 24 Me. 513, 517. Nor can the court decree a specific performance when the plaintiff has already recovered a judgment at law upon the contract; for his suit is not then based upon an agreement in writing: Bubier v. Bubier, 24 Me. 42, 47.

§ 326, [3] Stearns v. Hubbard, 8 Me. 320; Wilton v. Harwood, 23 Me. 131, 133; Marston v. Humphrey, 24 Me. 513, 517; Hunt v. Roberts, 40 Me. 187; Patterson v. Yeaton, 47 Me. 308, 315. But in Chamberlain v. Black, 64 Me. 40, the court decreed the complete specific performance of an agreement partly oral and partly written.

§ 327, [1] Dwinal v. Smith, 25 Me. 379; Given v. Simpson, 5 Me. 303, 309; Traip v. Gould, 15 Me. 82; Gardiner v. Gerrish, 23 Me. 46; Sargent v. Salmond, 27 Me. 539, 547; Caswell v. Caswell, 28 Me. 232, 236; Foss v. Haynes, 31 Me. 81, 89; Hartshorn v. Eames, 31 Me. 93, 96; Fletcher v. Holmes, 40 Me. 364; Stover v. Poole, 67 Me. 217; Webster v. Clark, 25 Me. 313, 315; Woodman v. Freeman, 25 Me. 531, 540.

§ 327, [2] Jurisdiction refused where the only relief was damages: Woodman v. Freeman, 25 Me. 531, 540; Piscataqua, etc., Co. v. Hill, 60 Me. 178; Denny v.

§ 328. **Creditors' Suits.**— Ample authority to entertain these suits is given by a statute; but, independently of this special enactment, and under the general jurisdiction in cases of fraud, the court exercised a power to relieve judgment creditors against the fraudulent transfers by debtors of their property, either real or personal.[1] By virtue of other sections of the statute, the court has power to give equitable relief to the parties interested in a levy made under an execution upon land of the judgment debtor;[2] and also to redeem lands thus levied upon.[3]

§ 329. **Trusts.**— The chapter of the Revised Statutes contains two distinct sections relating to trusts,— one of them in general terms giving jurisdiction "in all cases of trust," the other conferring power to construe wills and to administer testamentary trusts. With reference to the first and more general grant, it was held in an early case, that, under a former provision of the statute, the jurisdiction was confined to express trusts.[1] This construction, however, no longer prevails. By the broad terms of the present statute the jurisdiction embraces all express trusts,[2]

Gilman, 26 Me. 149, 153. The general jurisdiction in cases of fraud did not enlarge the equity powers of the court over mortgages: French v. Sturdivant, 8 Me. 246, 251; nor its powers to compel the specific performance of verbal contracts for the sale of land: Wilton v. Harwood, 23 Me. 131, 133; nor in cases of attachment: Skeele v. Stanwood, 33 Me. 307.[a]

§ 328, [1] Gordon v. Lowell, 21 Me. 251; Webster v. Clark, 25 Me. 313; Traip v. Gould, 15 Me. 82; Sargent v. Salmond, 27 Me. 539, 547; Caswell v. Caswell, 28 Me. 232, 236; Hartshorn v. Eames, 31 Me. 93, 96; Webster v. Clark, 25 Me. 313, 315.

§ 328, [2] Maine Rev. Stats., chap. 76, §§ 14, 20, pp. 572, 573; Warren v. Ireland, 29 Me. 62; Garnsey v. Garnsey, 49 Me. 167; Thayer v. Mayo, 34 Me. 142; Glidden v. Chase, 35 Me. 90, 56 Am. Dec. 690; Keen v. Briggs, 46 Me. 469; Day v. Swift, 48 Me. 369; Wilson v. Gannon, 54 Me. 384.

§ 328, [3] Maine Rev. Stats., chap. 76, § 25; Boothby v. Commercial Bank, 30 Me. 361, 363.

§ 329, [1] Given v. Simpson, 5 Me. 303.

§ 329, [2] Morton v. Southgate, 28 Me. 41; Pratt v. Thornton, 28 Me. 355, 366, 48 Am. Dec. 492; Tappan v. Deblois, 45 Me. 122, 131; Cowan v. Wheeler, 25 Me. 267, 43 Am. Dec. 283.

(a) The present jurisdiction in matters of fraud is much broader. See Taylor v. Taylor, 74 Me. 582; Merrill v. McLaughlin, 75 Me. 64.

all trusts arising by operation of law, and recognized by the doctrines of equity jurisprudence, whether resulting, implied, or constructive,[3] and charitable trusts.[4] By the other clause there is a complete jurisdiction for the construction of wills which create any trust relation, and for the execution of testamentary trusts, supervision of trustees, regulating the disposition and investment of trust property, and the like.[5]

§ 330. **Mistake and Accident — Reformation.**— The jurisdiction ordinarily possessed by courts of equity growing out of mistake or accident, and to grant the remedy of reformation according to the settled rules of equity jurisprudence, seems to have been fully conferred by the statute, and to have been freely exercised without any special limitations.[1]

§ 331. **Nuisance and Waste.**— Under the statutory provision concerning these subjects, the court has held that its jurisdiction extends to all cases of proper waste or nuisance, according to well-settled doctrines of equity jurisprudence, where the remedy at law is inadequate, and where the plaintiff's title is clear, or if disputed has been established by a recovery at law, and enables it to grant the relief of abatement and of injunction; but there is no jurisdiction in cases where the only relief is a recovery of damages.[1]

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[3] Linscott v. Buck, 33 Me. 530, 534; Roxbury v. Huston, 37 Me. 42; Richardson v. Woodbury, 43 Me. 206; Tappan v. Deblois, 45 Me. 122, 131; McLarren v. Brewer, 51 Me. 402; Crooks v. Rogers, 58 Me. 339, 342; Russ v. Wilson, 22 Me. 207, 210.

[4] Tappan v. Deblois, 45 Me. 122, 131; Preachers' Aid Soc. v. Rich, 45 Me. 552, 559; Howard v. Am. Peace Soc., 49 Me. 288, 306; Nason v. First Church, etc., 66 Me. 100.

[5] Construction of wills: Morton v. Barrett, 22 Me. 257, 39 Am. Dec. 575; Wood v. White, 32 Me. 340, 52 Am. Dec. 654 (correction of a mistake in the christian name of a legatee); Howard v. Am. Peace Soc., 49 Me. 288, 306; Baldwin v. Bean, 59 Me. 481; Richardson v. Knight, 69 Me. 285, 289; Jones v. Bacon, 68 Me. 34, 28 Am. Rep. 1; Slade v. Patten, 68 Me. 380; Everett v. Carr, 59 Me. 325. Executing testamentary trusts: Morton v. Southgate, 28 Me. 41; Bugbee v. Sargent, 23 Me. 269; Bugbee v. Sargent, 27 Me. 338; Tappan v. Deblois, 45 Me. 122, 131; Preachers' Aid Soc. v. Rich, 45 Me. 553, 559; Howard v. Am. Peace Soc., 49 Me. 288, 306; Elder v. Elder, 50 Me. 535; Richardson v. Knight, 69 Me. 285, 289; Nason v. First Church, etc., 66 Me. 100.

[1] In most of these cases a reformation was granted: Wood v. White, 32 Me. 340, 52 Am. Dec. 654 (mistake in name of a legatee in a will corrected); Farley v. Bryant, 32 Me. 474; Tucker v. Madden, 44 Me. 206, 216; Adams v. Stevens, 49 Me. 362, 366; Stover v. Poole, 67 Me. 218; Jordan v. Stevens, 51 Me. 78, 81 Am. Dec. 556. In this case the court held that the jurisdiction given by statute was not confined to mistakes of fact, and that a court of equity has power, under some circumstances, to relieve from a mistake of law.

§ 332. **Partnership, Part Owners, and Accounting.**— The statutes do not in terms give the jurisdiction ordinarily possessed by courts of equity over all matters of accounting; the only express grant of power is that contained in this subdivision of the statute relating to partners and other part owners. The supreme court seems to have given a restricted construction to the clause, and to have confined the equitable jurisdiction under it to cases between true legal partners, or between joint owners or co-owners of real or personal property, for the purpose of determining, by means of an accounting, their respective shares, and adjusting their mutual claims.[1]

§ 333. **Injunction.**— While the statute authorizes injunctions "in cases of equity jurisdiction," this language, it was held, referred only to the limited jurisdiction conferred upon the courts of Maine, and did not permit an injunction under all the circumstances in which it may be used by a tribunal clothed with full equitable powers. The supreme court has therefore dealt with injunctions in a very cautious and guarded manner.[1]

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§ 331, [1] Cases of nuisance: Porter v. Witham, 17 Me. 292; Androscoggin, etc., R. R. v. Androscoggin R. R., 49 Me. 392, 403; Varney v. Pope, 60 Me. 192. Cases of waste: The jurisdiction is confined to cases of technical waste, and the statute cannot be extended by implication to embrace cases of trespasses: Leighton v. Leighton, 32 Me. 399, 402.

§ 332, [1] Cases of partnership: Reed v. Johnson, 24 Me. 322, 325; Woodward v. Cowing, 41 Me. 9, 12, 66 Am. Dec. 211; Holyoke v. Mayo, 50 Me. 385; Pray v. Mitchell, 60 Me. 430. Cases of part owners: Maguire v. Pingree, 30 Me. 508; Ripley v. Crooker, 47 Me. 370, 378, 74 Am. Dec. 491; Mustard v. Robinson, 52 Me. 54; Carter v Bailey, 64 Me. 458, 465, 18 Am. Rep. 273; Somes v. White, 65 Me. 542, 20 Am. Rep. 718. With respect to accounting in general, see McKim v. Odom, 12 Me. 94; Carter v. Bailey, 64 Me. 458, 465, 18 Am. Rep. 273.[a]

(a) A bill for an accounting by the owners of a vessel against the master, who had taken her on shares, is not maintainable, since the remedy at law is ample. Bird v. Hall, 73 Me. 73.

§ 334. **Taxation by Municipal Corporation.**—A modern statute gives a special jurisdiction, which perhaps does not exist independently of statutory authority, to interfere at the suit of taxable inhabitants, and prevent counties, cities, towns, and school districts from pledging their credit, laying taxes, or paying out public money for any purpose not authorized by law. The nature, extent, and limits of this judicial power are discussed and determined in the cases collected in the foot-note.[1]

§ 335. **Discovery.**— Discovery as an independent source of jurisdiction is distinctly repudiated. No suit could therefore be maintained for discovery and relief unless there was otherwise a jurisdiction to entertain the suit for the relief alone. Nor, as it seems, was a bill of discovery, properly so called, without relief in aid of an action or defense at law authorized by the statutory language. The only discovery permitted was in aid of a relief which could be obtained under some of the specified heads of jurisdiction conferred by the statute.[1]

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§ 333, [1] The injunction has been allowed to restrain an action or judgment at law on the ground of fraud, or mistake, or purely equitable defense, but with great caution: Chalmers v. Hack, 19 Me. 124, 127; Cowan v. Wheeler, 25 Me. 267, 282, 43 Am. Dec. 283; Titcomb v. Potter, 11 Me. 218; Russ v. Wilson, 22 Me. 207; Devoll v. Scales, 49 Me. 320; Marco v. Low, 55 Me. 549; to restrain waste or nuisance: Porter v. Witham, 17 Me. 292; Androscoggin, etc., R. R. v. Androscoggin R. R., 49 Me. 392, 403; Varney v. Pope, 60 Me. 192; Leighton v. Leighton, 32 Me. 399, 402; and in extreme cases to restrain trespasses: Leighton v. Leighton, 32 Me. 399, 402; Spofford v. Bangor, etc., R. R., 66 Me. 51. For cases concerning injunctions in general, see Russ v. Wilson, 22 Me. 207; Smith v. Ellis, 29 Me. 422, 425; York, etc., R. R. v. Myers, 41 Me. 109; Morse v. Machias, etc., Co., 42 Me. 119, 127; Lewiston Falls Mfg. Co. v. Franklin Co., 54 Me. 402.

§ 334, [1] Clark v. Wardwell, 55 Me. 61; Johnson v. Thorndike, 56 Me. 32, 37; Allen v. Inhabitants of Jay, 60 Me. 124, 11 Am. Rep. 185; Marble v. McKenney, 60 Me. 332. There is no power whatever in a court of equity to review the proceedings of county, town, or city officials in the matter of laying out or establishing roads or streets: Baldwin v. Bangor, 36 Me. 518, 524.

§ 335, [1] Coombs v. Warren, 17 Me. 404, 408; Woodman v. Freeman, 25 Me. 531, 543 (no discovery without relief in aid of an action or defense at law); Russ v. Wilson, 22 Me. 207, 210; Warren v. Baker, 43 Me. 570, 574 (no

§ 336. **Damages.**— The power to award damages in a proper case, as a necessary incident to other purely equitable relief and in the same decree, is fully admitted, and even to award damages alone in very special cases; but the jurisdiction has been exercised with the utmost caution and reserve.[1]

§ 337. **Other Special Subjects.**— In addition to the foregoing general grants of jurisdiction, the statutes of Maine contain numerous other provisions authorizing an equitable suit and equitable relief under the special circumstances and for the special purposes therein described.[1] The most important of these clauses which have received any judicial construction are those relating to banks and other corporations,[2] and to the affairs of railroad companies.[3] Cases illustrating one or two other matters incidentally relating to the equitable jurisdiction may be found in the footnote.[4] It is plain from the foregoing summary that the decisions made by the supreme court of Maine are not safe guides in ascertaining the nature, extent, and limits of the powers possessed by tribunals having a full equitable jurisdiction, like the English court of chancery, or the courts in many of our states. At the same time many of its opinions

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jurisdiction for a bill of discovery alone in aid of an action at law); Dinsmore v. Crossman, 53 Me. 441; Foss v. Haynes, 31 Me. 81.

§ 336, [1] Woodman v. Freeman, 25 Me. 531, 532, 543. The opinion in this case contains a most able, full, and instructive discussion of the whole subject of damages in equity. See also Piscataqua, etc., Co. v. Hill, 60 Me. 178; Haskell v. Allen, 23 Me. 448, 451; Denny v. Gilman, 26 Me. 149, 153. The supreme court has constantly felt itself restricted and cramped as a court of equity by a provision in the state constitution preserving a right to trial by jury.

§ 337, [1] *Ante*, § 286, note.

§ 337, [2] Me. Rev. Stats., chap. 47, §§ 46, 47, 57, 74, 99; Hewitt v. Adams, 50 Me. 271, 277; Bank of Mut. Redemption v. Hill, 56 Me. 385, 388, 96 Am. Dec. 470; Wiswell v. Starr, 48 Me. 401; American Bank v. Wall, 56 Me. 167; Dane v. Young, 61 Me. 160; Baker v. Atkins, 62 Me. 205; Jones v. Winthrop, 66 Me. 242.

§ 337, [3] Me. Rev. Stats., chap. 51, §§ 10, 53; Illsley v. Portland, etc., R. R. Co., 56 Me. 531, 537; In re Bondholders of York, etc., R. R., 50 Me. 552, 564; Kennebec, etc., R. R. v. Portland, etc., R. R., 54 Me. 173.

§ 337, [4] The statute of limitations and lapse of time; their effects upon the exercise of the jurisdiction: Chapman v. Butler, 22 Me. 191; Lawrence v. Rokes, 61 Me. 38, 42. Equitable set-off: Smith v. Ellis, 29 Me. 422, 426.

dealing with doctrines of equity jurisprudence which belong to branches of the jurisdiction conferred upon it are exceedingly valuable and instructive, both for the learning and the ability of their discussions.

§ 338. **Pennsylvania.**— The equitable jurisdiction in Pennsylvania, until the recent legislation quoted in the last section, has been so peculiar, so unlike that prevailing in any other state, that I shall only attempt to describe it in a very general manner. A full and detailed account, with all the modes of operating the system, can only be given by means of an extended examination of numerous decided cases, and many quotations from judicial opinions. I must leave the reader to make his own examination of the cases cited in the foot-notes, the perusal of which will give him a clear notion of the system in all its theory and practical working.

§ 339. **Equitable Powers of the Common-law Courts.**— The courts of original general jurisdiction have been strictly common-law tribunals, and the common-law forms of action have continued in use until the present day. The equitable jurisdiction prevailing until recently may be described, in one sentence, to consist of the adoption by the courts of the doctrines of equity, and the application of such doctrines, in combination with rules of the common law, in the trial and decision of legal actions, and the granting of equitable reliefs so far as was possible by means of enlarging the scope and molding the operation of the various common-law forms of action. The resulting jurisprudence of the state was therefore one uniform system containing an admixture of legal and equitable doctrines and rules, legal and equitable rights and duties, legal remedies, and to a limited extent equitable remedies. There was, however, no power in the courts to entertain a distinctively equitable suit, and to render a decree giving purely equitable relief; the only equitable reliefs possible were those obtainable, sometimes directly, but more often indirectly, through the verdict of a jury and the judgment of the court thereon in some common-law action,— as, for example, an action of ejectment, or of covenant.

§ 340. For a long time the legislature refused not only to create any separate court of chancery, but even to confer any distinctively equitable powers, with one or two trivial exceptions, upon the courts of law. The judges were therefore compelled, in order to prevent a failure of justice, to invent some mode of administering equity. This was accomplished by the adoption of the principles, doctrines, and rules of equity jurisprudence as a part of the *law* of the state. The decision of common-law actions was made to depend, not upon the strict rules of the common law alone, but, as well, upon the rules of equity; and of course the scope, object, and effect of these actions were greatly modified. Purely equitable demands were enforced by legal actions and judgments; purely equitable defenses were permitted in such actions; purely equitable reliefs were, to a considerable extent, obtained by means of actions at law. All this was accomplished by the intervention of the judges, by the control which they exercised over the action of juries, and by their molding the judgment entered upon a verdict so as to render it special and adapted to the circumstances of the particular case, and the equitable rights of the litigant parties. By these most admirable contrivances the evil effects of ignorance and prejudice in the legislature were in a great measure obviated, and the courts were able to exercise, in effect, a wide equitable jurisdiction, and to incorporate all the principles and important doctrines of equity jurisprudence into the municipal law of Pennsylvania. I have collected in the foot-note a number of cases to illustrate the foregoing conclusions, and to explain the system, not only in its general theory, but in all the detail of its practical operations.[1] [a]

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[1] Pollard v. Shaffer, 1 Dall. 210, 211, 1 Am. Dec. 239; Wikoff v. Coxe, 1 Yeates, 353, 358; Hollingsworth v. Fry, 4 Dall. 345, 348; Wharton v. Morris,

(a) See also Russell v. Baughman, 94 Pa. St. 400; Rennyson v. Rozell, 106 Pa. St. 412; Appeal of Fidelity, etc., Deposit Co., 99 Pa. St. 443; Hall's Appeal, 112 Pa. St. 54; Rowand v. Finney, 96 Pa. St. 192; Ken-

§ 341. Separate Equity Jurisdiction Given by Statutes.— A change at length took place in the legislative policy. The statutes cited in the preceding section show that, as the first step, a few specified and distinctively equitable powers were conferred upon a certain court of limited territorial jurisdiction. The court, thus clothed with this new authority, was thereby enabled to entertain equitable suits and to administer equitable reliefs, according to the course and proceeding in chancery. The same powers were subsequently given to other tribunals. In the progress of time, and by successive enactments, the equitable powers themselves were gradually enlarged and multiplied, until by the latest statute of the series, passed at quite a recent date, a full equitable jurisdiction is granted to all the courts of original general jurisdiction throughout the state. It is settled with absolute unanimity of decision that these statutory grants of a distinctive chancery jurisdiction, and the equity functions conferred thereby, do not in the least abridge, interfere with, or affect the powers always heretofore held by the courts of applying equitable doctrines and administering equitable reliefs through the means of legal actions and as a part of the law; this peculiar province of the courts still remains unchanged by the modern legislation. The total result seems to be that the courts of Pennsylvania in reality possess two equitable jurisdictions,—

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1 Dall. 124, 125; Dorrow v. Kelly, 1 Dall. 142, 144; Stansbury v. Marks, 4 Dall. 130; Ebert v. Wood, 1 Binn. 217, 2 Am. Dec. 436; Murray v. Williamson, 3 Binn. 135; Jordan v. Cooper, 3 Serg. & R. 564, 578, 579, 589; Funk v. Voneida, 11 Serg. & R. 109, 115; Hawthorn v. Bronson, 16 Serg. & R. 269, 278; Lehr v. Beaver, 8 Watts & S. 106; Kuhn v. Nixon, 15 Serg. & R. 118, 125; Cope v. Smith's Ex'rs, 8 Serg. & R. 110, 115; Bixler v. Kunkle, 17 Serg. & R. 298, 303; Martzell v. Stauffer, 3 Penr. & W. 398, 401; Patterson v. Schoyer, 10 Watts, 333; Seitzinger v. Ridgway, 9 Watts, 496, 498; Cassell v. Jones, 6 Watts & S. 452; Torr's Estate, 2 Rawle, 552.

singer v. Smith, 94 Pa. St. 384; Winpenny v. Winpenny, 92 Pa. St. 440; Connolly v. Miller, 95 Pa. St. 513; Wheeling, etc., R. R. Co. v. Gourley, 99 Pa. St. 171; Edwards v. Morgan, 100 Pa. St. 330; Elbert v. O'Neil, 102 Pa. St. 302; Wills v. Van Dyke, 109 Pa. St. 330; Bell v. Clark, 111 Pa. St. 92; Curry v. Curry, 114 Pa. St. 367; Reno v. Moss, 120 Pa. St. 49; Wylie v. Mausley, 132 Pa. St. 68; Barclay's Appeal, 93 Pa. St. 50.

the one arising from their own judicial action, and exercised in combination with the law, according to the methods and procedure of common-law actions; the other expressly conferred by the statutes, and exercised by means of proper suits in equity, according to the methods and procedure of the court of chancery.[1] I will merely remark, in conclusion, that while the decisions of the Pennsylvania courts may be referred to as authorities upon the principles, doctrines, and rules of equity jurisprudence,— and many of them are exceedingly valuable from their breadth of view,— they are, from the necessities of their peculiar conditions, of comparatively little value upon questions of the equitable jurisdiction. This may at least be regarded as true of the decisions made prior to the latest statutes conferring a general jurisdiction in chancery.

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[1] See *ante*, § 286, note. With reference to the amount and extent of the distinctively chancery jurisdiction given by the legislature, the earlier statutes of the series were strictly interpreted. The courts invariably refused to exercise any powers under them except those which were expressly conferred; enlarging their jurisdiction by implication was steadily resisted. Under the later and more comprehensive enactments, a full equitable jurisdiction is asserted, subject to the limitation inherent in the very conception of equity jurisdiction, that an adequate remedy cannot be obtained at law. This limitation, however, is liberally dealt with, and is not treated as having received any larger or more imperative or restrictive force from the statute. I collect the cases into two groups: 1. Those which hold that the ancient and peculiar equitable functions of the court and the system of applying equitable doctrines in administering the law remain unaffected; and 2. Those which deal with the extent of chancery jurisdiction granted by the statutes. The latter group are arranged chronologically.

1. Cases relating to the general effect of the statutes upon the former equity system: Church v. Ruland, 64 Pa. St. 432, 441; Hauberger v. Root, 5 Pa. St. 108, 112; Robinson v. Buck, 71 Pa. St. 386, 391; Biddle v. Moore, 3 Pa. St. 161, 176; Aycinena v. Peries, 6 Watts & S. 243, 257; Wesley Church v. Moore, 10 Pa. St. 273; Painter v. Harding, 3 Phila. 59.

2. Cases relating to the extent and amount of equity jurisdiction: Gilder v. Merwin, 6 Whart. 522, 540–543; Dalzell v. Crawford, 1 Pars. Cas. 37, 41; Comm. v. Bank of Pa., 3 Watts & S. 184, 193; Hagner v. Heyberger, 7 Watts & S. 104, 106; Bank of U. S. v. Biddle, 2 Pars. Cas. 31; Bank of Ky. v. Schuylkill Bank, 1 Pars. Cas. 181, 219; Kirkpatrick v. McDonald, 11 Pa. St. 387, 392; Skilton v. Webster, Bright. N. P. 203; Strasburgh R. R. Co. v. Echternacht, 21 Pa. St. 220, 60 Am. Dec. 49; Mulvany v. Kennedy, 26 Pa. St. 44; Patterson v. Lane, 35 Pa. St. 275; Gallagher v. Fayette Co. R. R., 38 Pa. St. 102; Hottenstein v. Clement, 3 Grant Cas. 316; Glonginger v. Hazard, 42 Pa. St. 389, 401; Weir v. Mundell, 3 Brewst. 594; Dohnert's Appeal, 64 Pa. St. 311, 313; Wheeler v. Philadelphia, 77 Pa. St. 338, 344.

§ 342. **The Other States — What States Included in This Division.**— In describing the extent of the equitable jurisdiction as established by judicial decision in the remaining states, I may, for all the purposes of the present inquiry, unite into one group and consider together all those which constitute the first, second, and fourth classes of the last preceding section.[1] Since in each of these classes the legislation purports to give a complete jurisdiction coincident with the entire scope of the equity jurisprudence, it will neither be necessary nor proper to examine, as in the case of Massachusetts and the few other states composing the third class, the particular departments or subject-matters of equitable cognizance enumerated by the statutes and coming within the judicial functions of the courts; my object will be accomplished by ascertaining the interpretation which has been put upon these general grants of power by the judiciary, and the total extent of jurisdiction which has been derived from them and exercised by the tribunals of each commonwealth. It will be remembered that in all the states forming the first class an equitable jurisdiction, equivalent in extent with that possessed by the English court of chancery, is expressly conferred;[2] in those forming the second class, the same amount of jurisdiction is implied from the statutory language;[3] while in those of the fourth class, the states which have adopted the reformed American system of procedure, and have therefore abolished all distinction between actions at law and suits in equity, a full authority is granted to determine all "civil actions," whatever be the nature of the primary right involved or of the remedy demanded.[4] In a few of these states the statutes conferring the equitable jurisdiction contain the clause, substantially the same with the sixteenth section of the United States Judiciary Act, expressly limiting the existence or exercise of the jurisdiction to those cases in which the remedy at law is inadequate.[5] In by far the greater number of the states, the statutes simply grant the equitable jurisdiction in general terms, without adding any such express limitation upon its existence, extent, or exercise.[6]

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[1] See *ante*, §§ 284, 285, 287, and notes thereunder.

[2] See *ante*, § 284, and note.

[3] See *ante*, § 285, and note.

[4] See *ante*, § 287, and note.

§ 343. **Questions Stated.**— Having thus recapitulated the legislation of these states, I shall proceed, in the first place, to examine the interpretation given to it by the courts; to inquire how far it has been accepted and acted upon to the full extent of the comprehensive language used by the legislatures, and what special effect, if any, has been attributed to the restrictive clause above mentioned found in some of the statutes; and thus to ascertain whether a complete system of equitable jurisdiction, practically commensurate with that held by the English court of chancery, has in fact been developed by the judiciary upon the basis of these general statutory grants. I shall then endeavor to ascertain, in the second place, whether, notwithstanding the adoption of such a system of jurisdiction purporting to be complete, any important departments or subjects originally belonging to the equity jurisprudence have been withdrawn by the operation of other statutes from the cognizance of the equity courts, or courts possessing equity powers, and placed perhaps under the control of separate special tribunals, so that these departments or subjects no longer form a part of the distinctive equitable jurisdiction and jurisprudence. I shall thus be able to present, in outline at least, the extent and scope of the equitable jurisdiction actually existing and administered by the courts in all the states composing this extensive group. Any more detailed examination in this section would be not only unnecessary, but impracticable.

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[5] The language of this clause varies slightly in different statutes, but its meaning is absolutely the same in all. The states in which it is found are Alabama, Arkansas, Connecticut, Delaware, Oregon, South Carolina, and in the earlier legislation of Missouri, but the later statutes of that state seem to have omitted it. To these may be added, in order to complete the list, Maine, Massachusetts, and New Hampshire, which belong to the third class of the preceding section.

[6] In California, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Missouri (the latest statutes), Nebraska, Nevada, New Jersey, New York, North Carolina, Ohio, Rhode Island, Tennessee, Vermont, Virginia, West Virginia, Wisconsin.

§ 344. **Special Statutory Limitation — Inadequacy of Legal Remedies.**— In most of the states where the legislation contains the clause expressly declaring that the equitable jurisdiction shall not extend to cases for which the legal remedy is adequate, the courts have followed the example set by the national judiciary, and have firmly established the doctrine that this clause is simply declaratory of a principle inherent in the very conception of equity as a department of the municipal law; that it produces no practical effect whatever upon the extent and nature of the general jurisdiction otherwise conferred, but leaves that jurisdiction exactly what it would have been had the limiting language never been incorporated into the statute. The clause, therefore, is not regarded as forming any new and statutory test or criterion of the jurisdiction; and the equitable powers of the courts are determined by the other and more general provisions of the statutes and by the universal principles of equity jurisprudence. The equitable jurisdiction in these states is held to be a complete and comprehensive system, except so far as it may have been abridged, with respect to particular branches or subjects, by the restrictive operation of other statutes.[1] In a

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[1] The decisions by the courts of different states which sustain the foregoing proposition of the text are collected in this note.

Oregon.— Howe v. Taylor, 6 Oreg. 284, 291, 292. See also Wells, Fargo & Co. v. Wall, 1 Oreg. 295; Hatcher v. Briggs, 6 Oreg. 31, 41.

Alabama.— Waldron v. Simmons, 28 Ala. 629, 631–633. The court, in commenting upon and construing section 602 of the Alabama code (quoted in the preceding section, in note under section 285), hold that the subdivision 4 refers to the time when the code itself was adopted, and the equitable jurisdiction is to be tested by its existence at that time, and if it then existed, very few states, however, the narrower mode of interpretation, similar to that which long prevailed in Massachusetts, has been adopted. The clause is treated as creating a statutory, new, and effective measure of the equitable jurisdiction, restricting its operation and preventing its exercise in any cases for which there is an adequate remedy at law, even though such cases were undoubtedly embraced within the jurisdiction according to its original unabridged extent and nature.[2]

has not been ousted by any laws subsequently passed. With respect to the entire section 602, the court say (p. 633): "Our conclusion is, that the first subdivision of section 602 is but the adoption of an existing rule; that the second and third subdivisions are modifications by way of enlargement of the system of chancery jurisprudence and jurisdiction which had been established in England before the American Revolution; and that the fourth subdivision was the adoption of that system as modified by the second and third subdivisions and by other sections of the code. And we are entirely satisfied that as to cases in which, originally, jurisdiction had vested legitimately in courts of chancery, the jurisdiction is not abolished by anything contained in section 602, although a plain and adequate remedy at law in such cases is provided by some other section of the code, no prohibitory or restrictive words being used." See also, to the same general effect, Hall v. Cannte, 22 Ala. 650; Youngblood v. Youngblood, 54 Ala. 486. In Lee v. Lee, 55 Ala. 590, it was held that the court of chancery, as in England, is the general guardian of all infants within its territorial jurisdiction, and has an original inherent jurisdiction to appoint guardians for them, and to control and remove their guardians, no matter how or by whom appointed; and this jurisdiction is not affected by the statutory jurisdiction given to the probate courts.

Arkansas.— Hempstead v. Watkins, 6 Ark. 317, 356, 357, 42 Am. Dec. 696, holds distinctly that the clause is simply declaratory, and creates no new rule.

Missouri.— Clark v. Henry's Adm'rs, 9 Mo. 336, 339, holds that courts of equity having original jurisdiction under the general doctrines of equity have not lost that jurisdiction because an adequate remedy has been provided by law. The extent of the equitable jurisdiction is not founded on or measured by the Missouri statutes, but by general usage. The clause in question is held to be declaratory merely: "This is a mere general definition of the nature and character of chancery courts as contradistinguished from courts of law." See also, to the same effect, that the jurisdiction extends to all matters of equitable cognizance, Cabanne v. Lisa, 1 Mo. 682; Janney v. Spedden, 38 Mo. 395; Biddle v. Ramsey, 52 Mo. 153; Meyers v. Field, 37 Mo. 434, 441; Magwire v. Tyler, 47 Mo. 115, 128.[a]

[2] *South Carolina.*— Hall v. Joiner, 1 S. C. 186, 190, per Willard, J.: "In this state, the exclusion of courts of equity from jurisdiction in cases where

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(a) Cox v. Volkert, 86 Mo. 505; Bank of Commerce v. Chambers, 96 Mo. 459; Humphreys v. Atlantic Milling Co., 98 Mo. 542, 10 S. W. 140.

§ 345. Extent of the General Statutory Jurisdiction.— The statutes of the remaining states composing the first, second, and fourth classes as heretofore arranged, are, with few exceptions, as we have seen, grants of general equitable jurisdiction described in somewhat vague terms, but all of them without any negative language or express limitation upon the nature and extent of this jurisdiction. In many of these commonwealths all the distinctive methods of procedure belonging to the English court of chancery had been borrowed without substantial change, and they even remain in use to the present day. In others, however,

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an adequate remedy is conferred at law rests on the statute; consequently a new remedy at law operates to destroy the pre-existing remedies in equity allowed for want of such legal remedy;" citing Eno v. Calder, 14 Rich. Eq. 154.[b] Upon this principle it was held that the suit for a discovery had been abrogated by the statutes authorizing parties to actions to be called as witnesses. In the case cited (Eno v. Calder, 14 Rich. Eq. 154), Dunkin, C. J., stated the same rule of interpretation in the same terms; but his remark was a mere *dictum*, entirely unnecessary to the decision of the case, which could not, according to any theory, have been sustained as coming within the equity jurisdiction, being a suit to recover a simple legal debt without the slightest equitable incident or feature. For an account of the early jurisdiction in this state, see Mattison v. Mattison, 1 Strob. Eq. 387, 391, 47 Am. Dec. 541.

Connecticut.— Norwich, etc., R. R. v. Storey, 17 Conn. 364, 370, 371, holds that it is the fundamental principle guiding the courts of Connecticut, and based upon the statutory restriction, that equity has no jurisdiction where the legal remedy is adequate. The doctrine was applied to a suit for an accounting, and the rule was laid down that the fact of the accounts between the parties being numerous and complicated does not give jurisdiction to a court of equity. See also the following cases, all of which show that the jurisdiction is confined strictly by the statutory limitation; they also determine the question whether, under the statutory distribution of power, the jurisdiction of a particular case belongs to the superior court or to the court of common pleas: Whittlesey v. Hartford, etc., R. R., 23 Conn. 421, 431; Stannard v. Whittlesey, 9 Conn. 559; Stone v. Pratt, 41 Conn. 285; Hine v. New Haven, 40 Conn. 478; Gainty v. Russell, 40 Conn. 450; Griswold v. Mather, 5 Conn. 435, 438; Hartford v. Chipman, 21 Conn. 488, 498; Swift v. Larrabee, 31 Conn. 225, 237; Middleton Bank v. Russ, 3 Conn. 135, 139, 8 Am. Dec. 164; New London Bank v. Lee, 11 Conn. 112, 121, 27 Am. Dec. 713.[c]

(b) See also Solomons v. Shaw, 25 S. C. 112.

(c) *Delaware.*— For the restrictive force given to the clause in this state, see Equitable Guarantee & T. Co. v. Donahoe (Del.), 45 Atl. 583.

these forms and modes of chancery pleading and practice were never adopted; but in their stead a peculiar hybrid system of administering equitable rights and interests grew up, based partly upon statute and partly upon usage, and resembling as much the proceedings in an action at law as those in a suit in equity.[1] It naturally followed that in these last-mentioned states it was for some time doubted — and indeed seems to have been an open judicial question — whether a full equitable jurisdiction was in fact possessed by the courts. Such doubts, however, have all been removed. The doctrine is established throughout all the states now under consideration — whether the legislation confers a jurisdiction in express terms equivalent to that held by the English chancery, or confers such a jurisdiction by implication, or in abolishing the distinctions between legal and equitable forms of procedure confers a jurisdiction to decide all civil actions — that a complete equitable jurisdiction commensurate in its extent with that belonging to the English court of chancery, and coincident in its operation with the entire domain of equity jurisprudence, exists in each one of these states, is possessed by some designated tribunals, and may be exercised by them in the modes of procedure established or sanctioned by law.[2]

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[1] As, for example, in Georgia, where suits in equity were tried by a jury, and it was repeatedly held that the "chancellor" consisted of the court and jury together.

[2] For the sake of completeness, I shall include in this list the *names* of the states which have been particularly described in preceding paragraphs and notes, merely referring to their former place of treatment.

Alabama.— See *ante*, § 344, and note.

Arkansas.— See *ante*, § 344, and note.

California.— The courts possess all the powers of a court of chancery,— a full jurisdiction over all matters of equitable cognizance: Sanford v. Head, 5 Cal. 297, 299; Wilson v. Roach, 4 Cal. 362, 366; Belloc v. Rogers, 9 Cal. 123, 129; Willis v. Farley, 24 Cal. 491, 499; People v. Davidson, 30 Cal. 380, 390; Dougherty v. Creary, 30 Cal. 209, 297, 89 Am. Dec. 116; People v. Houghtaling, 7 Cal. 348, 351; Smith v. Rowe, 4 Cal. 6; De Witt v. Hays, 2 Cal. 463, 468, 469, 56 Am. Dec. 352.[a]

[a] *California.*— See also Reay v. Butler, 69 Cal. 572, 579, 11 Pac. 463; Nunez v. Morgan, 77 Cal. 427, 19 Pac. 753; Wallace v. Maples, 79 Cal. 433, 21 Pac. 860; Arguello v. Bours, 67 Cal. 447, 8 Pac. 49; Meeker v.

§ 346. Jurisdiction over Administrations.—Having thus described the theoretically complete — and in most matters actually complete — equitable jurisdiction existing in most of the states, the inquiry still remains whether any branches

Connecticut.— See *ante*, § 344, and note.

Georgia.— The equitable jurisdiction is, in general, that possessed by the court of chancery in England. The present code (§ 3045) confers the jurisdiction in express terms, and does not by any of its more specific provisions materially change that jurisdiction: Mordecai v. Stewart, 37 Ga. 364, 375–377, 382; Walker v. Morris, 14 Ga. 323, 325–327; Collins v. Barksdale, 23 Ga. 602, 610; Williams v. McIntyre, 8 Ga. 34, 42; Beale v. Ex'rs of Fox, 4 Ga. 404, 425, 426; Gilbert v. Thomas, 3 Ga. 575, 579, 580; Justices of the Inferior Court, etc. v. Hemphill, 9 Ga. 65, 67; Cook v. Walker, 15 Ga. 457, 466–473.[b]

Illinois.— The general equitable jurisdiction is that held by the English chancery, except where limited by an express statute, or where some other court is clothed by statute with exclusive jurisdiction over a particular matter: Maher v. O'Hara, 4 Gilm. 424, 427; Isett v. Stuart, 80 Ill. 404, 22 Am. Rep. 194.[c]

Indiana.—A full equity jurisdiction, as that exercised by the English court of chancery: McCord v. Ochiltree, 8 Blackf. 15, 17–20 (containing an interesting historical sketch of the jurisdiction during the territorial period and since the organization of the state); Matlock v. Todd, 25 Ind. 128.

Iowa.— A distinct and full equity jurisdiction recognized and preserved by the constitution: Claussen v. Lafrenz, 4 G. Greene, 224; Laird v. Dickerson, 40 Iowa, 665, 669; Sherwood v. Sherwood, 44 Iowa, 192.

Kansas.— A full chancery jurisdiction is exercised through the "civil action" over all matters belonging to the general equity jurisprudence, although the constitution makes no mention of any distinction between law and equity or legal and equitable powers: Sattig v. Small, 1 Kan. 170, 175; Shoemaker v. Brown, 10 Kan. 383, 390.

Kentucky.— All the decisions assume and recognize the jurisdiction in this state, without any statutory limit: Johnson v. Johnson, 12 Bush, 485 (a full equitable jurisdiction is possessed by the Louisville chancery court).

Louisiana.— While the superior courts are said to have a general equity jurisdiction, it is plain that the "equity" thus spoken of is not exactly synonymous with the system of equity jurisprudence administered by the court of chancery in England, and by the courts of the other states in which the common law has been adopted. The term is used in the meaning given to it by modern *civilians*, as the power to decide according to natural justice in cases where the positive law is silent. Thus "in all civil matters where there is no express law, the judge is bound to proceed and decide accord-

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Dalton, 75 Cal. 154, 16 Pac. 764; Helm v. Wilson, 76 Cal. 476, 18 Pac. 604.

(b) *Georgia.* — Markham v. Huff, 72 Ga. 874.

(c) *Illinois.*—Howell v. Moores, 127 Ill. 67, 19 N. E. 863; Walker v. Doane, 108 Ill. 236; Ide v. Sayer, 129 Ill. 230, 21 N. E. 810.

or subjects originally belonging to this jurisdiction have been withdrawn from it by other statutes, so that they no longer come within the ordinary cognizance of the equity courts. One very conspicuous branch of the original juris-

ing to *equity*. To decide *equitably*, an appeal is made to natural law and reason, or to received usages, where positive law is silent": Civ. Code, art. XXI.; Clarke v. Peak, 15 La. Ann. 407, 409; Welch v. Thorn, 16 La. 188, 196; Kittridge v. Breaud, 4 Rob. (La.) 79, 39 Am. Dec. 512.

Maine.— See *ante*, §§ 322–337, and notes.

Maryland.— The full jurisdiction of the English chancery. "The chancery court of England has always been regarded as the prototype of that of Maryland. . . . As mere courts of equity there is scarcely any difference between the court of chancery of Maryland and that of England": Cunningham v. Browning, 1 Bland, 299, 301; Amelung v. Seekamp, 9 Gill & J. 468, 472; Manly v. State, 7 Md. 135, 146.

Massachusetts.— See *ante*, §§ 311–321, and notes.

Michigan.— The jurisdiction of the English court of chancery is given in express terms by the statute.[d]

Minnesota.— A full jurisdiction over all matters cognizable in courts of equity, administered by the one "civil action": Gates v. Smith, 2 Minn. 30, 32.

Mississippi.— A complete general jurisdiction in equity is given by the constitution and by the statutes to the court of chancery as the tribunal of first resort, and to the high court of errors and appeals as the appellate tribunal. This jurisdiction is exercised whenever the law does not furnish a complete, certain, and adequate remedy; but this limitation is regarded as an element inherent in the very nature of the equitable jurisdiction itself, and not as a mandatory restriction imposed upon the court by statute. The equitable jurisdiction has always been asserted and exercised by the courts of Mississippi in as free and progressive a manner as by those of any other state. In fact, the equity system of Mississippi is much more complete than that to be found in many of the states. These conclusions are fully sustained by the following decisions, and their number might easily be increased: Shotwell v. Lanson, 30 Miss. 27; Echols v. Hammond, 30 Miss. 177; Haynes v. Thompson, 34 Miss. 17; Boyd v. Swing, 38 Miss. 182; Barnes v. Lloyd, 1 How. 584; Freeman v. Guion, 11 Smedes & M. 58, 65 (all the foregoing cases deal with the question of there being an adequate remedy at law or not); Farish v. State, 2 How. 826, 829; Farish v. State, 4 How. 170, 175. See also cases cited *post*, § 350, in note, as to the jurisdiction in the administration of decedents' estates.

Missouri.— A full general jurisdiction as held by the English chancery: Clark v. Henry's Adm'r, 9 Mo. 336, 339; Cabanne v. Lisa, 1 Mo. 682; Jandiction has been thus either expressly or practically withdrawn in a great majority of the commonwealths. No department of the equity jurisdiction and jurisprudence as administered in England is more important, or more fre-

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[d] A statute of 1887, providing for a final decision of questions of fact in equity proceedings by the verdict of a jury, was declared unconstitutional in Brown v. Buck, 75 Mich. 274, 13 Am. St. Rep. 438, 42 N. W. 827, 5 L. R. A. 226.

ney v. Spedden, 38 Mo. 395; Biddle v. Ramsey, 52 Mo. 153; Meyers v. Field, 37 Mo. 434, 441; Maguire v. Tyler, 47 Mo. 115, 128; Lackland v. Garesche, 56 Mo. 267, 270.

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Nebraska.—A full jurisdiction administered by the single civil action: Wilcox v. Saunders, 4 Nebr. 69.

Nevada.—A full equity jurisdiction administered by the single civil action in all cases where there is not a complete, certain, and adequate remedy at law: Champion v. Session, 1 Nev. 478; Sherman v. Clark, 4 Nev. 138, 97 Am. Dec. 516; Conley v. Chedic, 6 Nev. 222.

New Hampshire.— See *ante*, §§ 299–310, and notes.

New Jersey.—A full general jurisdiction held and exercised to the same extent and under the same limitations as by the English court of chancery. The whole course of decisions in the chancery court assumes such a jurisdiction, although it is not defined by any legislation, and seldom by any judicial opinion: Jackson v. Darcy, 1 N. J. Eq. 194; Wooden v. Wooden, 3 N. J. Eq. 429; Hopper v. Lutkins, 4 N. J. Eq. 149; Hoagland v. Township, etc., 17 N. J. Eq. 106; Winslow v. Hudson, 21 N. J. Eq. 172. In 19 N. J. Eq., at page 577, may be found an interesting history of the chancery court in New Jersey, written by Mr. Chancellor Zabriskie, and published as an appendix to the volume. See also *post*, § 350, and note, for decisions concerning the jurisdiction in the administration of decedents' estates.

New York.—An equity jurisdiction commensurate with that of the English chancery is expressly given by the legislation. It follows that the supreme court, and the other tribunals of the same original jurisdiction with reference to subject-matter, although somewhat restricted as to persons within certain territorial districts, possess all the jurisdiction which was held by the equity courts of the colony at any time, and which was held by the high court of chancery in England on the fourth day of July, 1776, with the exceptions, additions, and limitations created and imposed by the legislation of the state. This jurisdiction is now exercised by means of the single "civil action." It will be seen that the only material exception or limitation created by the state legislation consists in the practical withdrawal of the control of administrators from the courts of equity, and the placing of that important branch of equity jurisprudence under the cognizance of the probate or surrogates' courts. The decisions involving the general question of jurisdiction are exceedingly numerous, but they all show that the equitable powers are to be exercised in every case where there is no complete, certain, and adequate remedy at law, but that this limitation is treated as an essential element of the original. jurisdiction of chancery, and not as abridging or curtailing that jurisdiction: Sherman v. Felt, 2 N. Y. 186; Newton v. Bronson, 13 N. Y. 587, 591, 67 Am. Dec. 89; Barlow v. Scott,

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(e) *Montana.*— See Zimmerman v. Zimmerman, 7 Mont. 114, 14 Pac. 665.

quently demands the attention of the chancery courts, than the accounting, final settlement, and administration of the personal estates of decedents. A very large percentage of the suits brought in the English equity tribunals are administration suits. I shall not attempt to discuss the origin of this jurisdiction over administrations. By some judges it has been described as a natural outgrowth of the authority

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24 N. Y. 40, 45; Wilcox v. Wilcox, 14 N. Y. 575, 579; Garcie v. Freeland, 1 N. Y. 228, 232, 235; Burch v. Newbury, 10 N. Y. 374, 387; Onderdonk v. Mott, 34 Barb. 106, 112; Boyd v. Dowie, 65 Barb. 237, 242; Brockway v. Jewett, 16 Barb. 590, 592; Garcie v. Sheldon, 3 Barb. 232; Matter of Bookhout, 21 Barb. 348, 349; De Hart v. Hatch, 3 Hun, 375, 380; Matter of McConihe v. Exchange Bank, 49 How. Pr. 422, 424; Fellows v. Herrmans, 13 Abb. Pr., N. S., 1, 6; Van Pelt v. U. S. Metallic Springs, etc., Co., 13 Abb. Pr., N. S., 325, 327. In Youngs v. Carter, 10 Hun, 194, 197, it was held that the equity jurisdiction thus given "includes of necessity all cases properly comprehended within established principles of equity jurisprudence. Nor can the test of the jurisdiction be restricted to the existence of some definite precedent for the action which may be brought; the case need only fall within the limits of any defined equitable principle; and equitable principles are as broad as the just wants and necessities of civilized society require." This is, in my opinion, a correct description of the equitable jurisdiction as it now exists in all the states of the three classes under consideration. Compare the equally correct views of Mr. Justice Currey, in Dougherty v. Creary, 30 Cal. 290, 297, 89 Am. Dec. 116.

North Carolina.— Complete jurisdiction exercised according to the inherent limitation when there is no certain and complete remedy at law, enforced at present by the one "civil action": Glasgow v. Flowers, 1 Hayw. (N. C.) 233; Perkins v. Bullinger, 1 Hayw. (N. C.) 367; Martin v. Spier, 1 Hayw. (N. C.) 369; Wells v. Goodbread, 1 Ired. Eq. 9; Thorn v. Williams, 1 Car. Law Rep. 362; Hook v. Fentress, Phill. Eq. 299, 233; Powell v. Howell, 63 N. C. 283.

Ohio.— The equitable jurisdiction is the same as that held by the English chancery. The early statute confining the jurisdiction to the cases where there is no plain and adequate remedy at law merely states an essential rule, and leaves the jurisdiction in exactly the same condition which it would have occupied had there been no such express statutory provision: Hulse v. Wright, Wright, 61, 65; Bank of Muskingum v. Carpenter's Administrator, Wright, 729, 732; Critchfield v. Porter, 3 Ohio, 518, 522; Oliver v. Pray, 4 Ohio, 175, 192, 19 Am. Dec. 595; Heirs of Ludlow v. Johnson, 3 Ohio, 553, 561, 17 Am. Dec. 609; Cram v. Green, 6 Ohio, 429, 430; Mawhorter v. Armstrong, 16 Ohio, 188; Douglas v. Wallace, 11 Ohio, 42, 45; Nicholson v. Pim, 5 Ohio St. 25; Lessee of Love v. Truman, 10 Ohio St. 45, 55; Clayton v. Frat, 10 Ohio St. 544, 546; Goble v. Howard, 10 Ohio St. 165, 168; Hager v. Reed, 11 Ohio St. 626, 635; Dixon v. Caldwell, 15 Ohio St. 412, 415, 86 Am. Dec. 487.

over trusts; by others, as resulting from the frequent necessity of applying to the court of chancery for a discovery of assets; by all, it is admitted that no adequate relief could be obtained from the common law or the ecclesiastical courts. Whatever be the correct explanation, the result was that the equitable jurisdiction of administrations, though often called concurrent, practically became exclusive.

Oregon.— See *ante*, § 344, and note; Howe v. Taylor, 6 Oreg. 284, 291, 292; Wells, Fargo & Co. v. Wall, 1 Oreg. 295; Hatcher v. Briggs, 6 Oreg. 31, 41.

South Carolina.— See *ante*, § 344, and note; Hall v. Joiner, 1 S. C. 186, 190; Eno v. Calder, 14 Rich. Eq. 154; Mattison v. Mattison, 1 Strob. Eq. 387, 391, 47 Am. Dec. 541. See also 1 Desaus. Eq. lii., for a sketch of the chancery jurisdiction in this state.

Tennessee.—A complete general equitable jurisdiction exercised under the inherent limitation that no certain and adequate remedy can be had at law: Dibrell v. Eastland, 3 Yerg. 533, 535; University v. Cambreling, 6 Yerg. 79, 84; Porter v. Jones, 6 Cold. 313, 317; Almony v. Hicks, 3 Head, 39, 42.

Texas.— There is not in the jurisprudence of this state any clear line of distinction between "law" and "equity," either with reference to the rules which define and determine primary rights and duties, or those which regulate remedies and procedure. Although the principles of the common law have been adopted by statute, yet they are blended with and modified by equity. This "equity" seems in part to be the natural justice of the civilians, but also in large part the equitable jurisprudence developed by the English court of chancery. It may with accuracy be said that the courts of Texas have full jurisdiction to recognize and give effect to any principles and doctrines of the equity jurisprudence to maintain any equitable rights, and to grant any equitable remedies. All rights and remedies, whether legal or equitable, are administered together by one action and in the same modes of procedure. These conclusions will be found fully sustained by the following decisions, and are assumed or implied in a great number of other cases: Ogden v. Slade, 1 Tex. 13, 15; Smith v. Clopton, 4 Tex. 109, 113; Spann v. Stern's Administrators, 18 Tex. 556; Seguin v. Maverick, 24 Tex. 526, 532, 76 Am. Dec. 117; Herrington v. Williams, 31 Tex. 448, 460, 461; Jones v. McMahan, 30 Tex. 719, 728; Newson v. Chrisman, 9 Tex. 113, 117; Smith v. Smith, 11 Tex. 102, 106; Coles v. Kelsey, 2 Tex. 541, 553, 47 Am. Dec. 661; Carter v. Carter, 5 Tex. 93, 100; Wells v. Barnett, 7 Tex. 584, 586, 587; Purvis v. Sherrod, 12 Tex. 140, 159, 160.

Vermont.— The decisions assume a full general equitable jurisdiction, with perhaps a somewhat greater weight given to the limitation that there is no adequate remedy at law than is given to it by the courts of many other states: Barrett v. Sargent, 18 Vt. 365, 369.

Wisconsin.—A full jurisdiction in all matters of equitable cognizance, administered by the "civil action": Janesville Bridge Co. v. Stoughton, 1 Pinn. 667; Danaher v. Prentiss, 22 Wis. 311.

§ 347. **Probate Courts.**—From a very early period of our history the policy has prevailed throughout the states of legislating with respect to the subject of administrations. This policy has been pursued with such uniformity and to such an extent, that in all the states, I believe without exception, special tribunals, unknown to the ancient judicial system of England, have been created, under different names,—probate courts, surrogates' courts, orphans' courts,—which possess a statutory jurisdiction over all matters of probate and administration, the proof of wills, the appointment of executors and administrators, the accounts of executors and administrators, the final settlement and distribution of the estates of deceased persons, both testate and intestate, and many other kindred subjects. Not only have such courts been established, but in very many states the doctrines and rules of the law regulating the administration of decedents' estates, whether testate or intestate, have been reduced to a statutory and often to a minutely codified form. The provisions of these statutes are to a large extent the principles and doctrines concerning the subject-matter which have been settled by the English and American courts of equity through a long course of decision. The effect of this entire legislation upon the equitable jurisdiction existing in the same states remains to be considered.

§ 348. **Class First. Ordinary Equity Jurisdiction over Administrations Abolished.**— The general effect produced by this legislative system may be briefly stated in one proposition. In a great majority of the states the original equitable jurisdiction over administrations is in all ordinary cases — that is, in all cases without any special circumstances, such as fraud, or without any other equitable feature, such as a trust — either expressly or practically abrogated. The courts of equity, in the absence of such special circumstances or distinctively equitable feature, either do not possess or will not exercise the jurisdiction, but leave the whole matter of administrations to the special probate tribunals. To describe this result more accurately, the states must be separated into two divisions. In the one class, the statutes creating the probate courts and defining their powers are drawn in such mandatory terms that the jurisdiction conferred upon them is held by the judicial interpretation to be exclusive; and no concurrent jurisdiction over administration is possessed by the courts of equity in any case, unless it involves some additional incident or feature — such as trust or fraud — which of itself, and independently of the administration, would be a sufficient ground for the interference of an equity court. In other words, this most important and extensive department has been completely cut off from the purely equitable jurisdiction, and transferred to that of the probate courts, although most of the doctrines concerning administration in general, hitherto settled by the courts of equity, and which form an integral part of the equity jurisprudence, have been preserved and made more compulsory in the statutes which regulate the proceedings and furnish rules for the decisions of these special probate tribunals.[1]

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[1] The decisions by which the result described in the text has been accomplished throughout the various states composing this class are collected and compared in this note.

Mississippi.— This view of the equitable jurisdiction for a long time prevailed in the state of Mississippi and was regarded as settled in the following among many other cases: Gilliam v. Chancellor, 43 Miss. 437, 448, 5 Am. Rep. 498; Blanton v. King, 2 How. 856; Carmichael v. Browder, 3 How. 252; but by an alteration in the statutes, and a change in the judicial interpretation, and especially by the latest constitution reconstructing the judiciary, this theory has been abandoned, and the original jurisdiction of equity over administrations has been fully re-established, as will appear in the note under the next paragraph. The line of decisions, of which the above are examples, have therefore been overruled.

Pennsylvania.— The doctrine of the text is firmly settled in this state by numerous decisions, of which the following are among the most recent; Dundas's Appeal, 73 Pa. St. 474, 479; Linsenbigler v. Gourley, 56 Pa. St. 166, 172, 94 Am. Dec. 51; Whiteside v. Whiteside, 20 Pa. St. 473, per Black, C. J.; Campbell's Appeal, 80 Pa. St. 298.

Massachusetts.— This state may also be included in the class, although the extent of its equitable system has already been described: Wilson v. Leisman, 12 Met. 316. See quotations from the opinion in note under § 320.

§ 349. **Class Second. Such Jurisdiction Practically Obsolete.** — In the other and more numerous division, the statutes creating the probate courts and defining their powers are not so negative and mandatory in their terms that they *ipso facto* render the probate jurisdiction absolutely exclusive. The equitable jurisdiction is *theoretically* left existing, and is sometimes spoken of as "concurrent with," and sometimes as "auxiliary to," that of the probate courts. Practically, however, it is abolished, or perhaps it would be more strictly accurate to say that its exercise is suspended, in all ordinary cases. The meaning of this proposition as explained in varying language by different judges is, that unless the case involves some special feature or exceptional circumstances of themselves warranting the interference of equity, such as fraud, waste, and the like, or unless it is of such an essential nature that a probate court is incompetent to give adequate relief, or is one of which the probate court, having taken cognizance, has completely miscarried and failed to do justice by its decree, the courts of equity will refuse to interpose and to exercise whatever dormant powers they may possess, but will leave the subject-matter and the parties to the jurisdiction of the statutory forum, which the legislature plainly regarded as sufficient and intended to be practically exclusive. According to this theory, the courts of equity do not deny the existence of any jurisdiction over administrations; but they treat their own jurisdiction as auxiliary and supplementary, and not as concurrent, only to be exercised in the exceptional cases where the probate jurisdiction is confessedly inadequate, or has actually shown itself insufficient.[1]

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[1] The following states properly belong to this division, although it will be seen by examining the decisions that a somewhat varying language has been employed by different courts to describe the condition of the jurisdiction:

Arkansas.— In Haag v. Sparks, 27 Ark. 594, it was held that generally courts of equity will not take jurisdiction of an administration when it is before the probate court; citing Moren v. McCown, 23 Ark. 93; Freeman v. Reagan, 26 Ark. 373. But when the circumstances are special, and the probate court cannot give adequate relief, equity will take jurisdiction. In Freeman v. Reagan, 26 Ark. 373, 378, the rule was stated

§ 350. **Class Third. Such Jurisdiction Existing and Concurrent.**— There is, however, still a third division, comprising a few of the states, in which, notwithstanding the probate courts with all the powers given them by statute, the original and full equitable jurisdiction over administrations

that courts of chancery will not, in general, take jurisdiction of an administration going on before the probate court; but still there may be cases of fraud, waste, etc., which would enable courts of chancery to interfere, and exercise powers not held by the probate court. In applying this rule, it may be remarked that whenever a probate court has, in any case, issued letters testamentary or of administration, admitted a will to probate, or taken any other judicial step, the administration will then be "pending" or "going on before" such probate court within the meaning of the language above quoted.

Connecticut.— Bailey v. Strong, 8 Conn. 278, 280.

Georgia.— Harris v. Tisereau, 52 Ga. 153, 159–163, 21 Am. Rep. 242. The probate court has, in all ordinary cases, an exclusive jurisdiction in the probate of wills, in the appointment of executors and administrators, and in administrations; citing Georgia Code, § 331; Slade v. Street, 27 Ga. 17; and Walton v. Walton, 21 Ga. 13. But equity has full jurisdiction in all cases of fraud; and where fraud thus exists, it may draw after it as an incident a jurisdiction over matters of administration. It had been held in an early case, decided under a former statute, that the original jurisdiction of equity in administrations still existed in Georgia: Walker v. Morris, 14 Ga. 323, 325–327; but this decision is no longer an authority. See also Collins v. Stephens, 58 Ga. 284.

Illinois.— Heustis v. Johnson, 84 Ill. 61; Freeland v. Dazey, 25 Ill. 294. In Heustis v. Johnson, 84 Ill. 61, which was a suit in equity against an administrator for a final accounting and settlement, the court stated the rule: "Courts of equity will not exercise jurisdiction over the administration of estates except in extraordinary cases. Some special reason must be shown why the administration should be taken from the probate court;" citing Freeland v. Dazey, 25 Ill. 294; and see Strubher v. Belsey, 79 Ill. 307, 308. And yet in Heward v. Slagle, 52 Ill. 336, which was an appeal by the distributees (or heirs) from a decree of the probate court finally settling the administrator's accounts, the supreme court said: "When the probate court has settled an administrator's account, and discharged the administrator, and the heirs are dissatisfied and wish a review and resettlement, and the estate is complicated, the better mode is by a bill in chancery, and not by appeal from the probate court."

New Jersey.— Frey v. Demarest, 16 N. J. Eq. 236, 239. For a statement of this decision and a more full explanation of the rule which seems to prevail in New Jersey, see the note under the next succeeding paragraph.

New York.— Chipman v. Montgomery, 63 N. Y. 221, 235, 236. Since this decision is quite recent, and since the reasoning and conclusions of the court will apply with equal force to the legislation of many other states besides New York, and fully illustrate the propositions of the text, I is held to remain unimpaired. The authority of courts of equity over the general subject of administration, which forms a part of the unabridged system of equity jurisprudence, still continues in those tribunals concurrent with that conferred upon the probate courts, and it may be exercised even though the case does not involve any special incidents or features which of themselves would constitute distinctive

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shall quote from the able opinion of Allen, J., at some length. The suit was equitable, brought by next of kin against an executor, praying various kinds of relief. In dismissing the suit, the court, by Allen, J., said (pp. 235, 236): "Again, as an action for accounting as to the personalty, as in case of intestacy, the action ought not to be sustained. The laws give full powers to the surrogate's court to call executors and administrators to account, and to distribute the estate among the next of kin, and to pass upon every question that may arise, directly or indirectly, in the progress of the accounting and final distribution. That is the *appropriate* tribunal, conceding that, to a limited extent, concurrent jurisdiction exists in a court of equity. The jurisdiction of courts of equity in respect to accounts in the course of administration, and the marshaling of assets, grew out of the defects in the process and powers of ecclesiastical courts, and the early courts of probate. The jurisdiction over cases of administration was made to rest upon the notion of a constructive trust in executors and administrators, as well as the necessity of taking accounts and compelling a discovery. But these considerations do not apply in ordinary cases to the settlement of estates in this state; and to withdraw a case of mere settlement of an estate, disconnected with the enforcement of a special and express trust, as distinguished from what is called a constructive trust in all administrations, from the tribunal created for that purpose with ample powers, special reasons should be assigned, and facts stated to show that full and complete justice cannot be done in that court. Upon a final accounting,— and that is what the plaintiffs are entitled to if they have any rights as next of kin,— creditors, as well as legatees and next of kin, are entitled to be heard; and they may much more easily be cited before a surrogate than made parties to a formal suit in equity. Chancellor Kent recognizes the rule that creditors may come into the court of chancery for the discovery of assets; but that draws the whole settlement of the estate into chancery, which certainly is not to be encouraged: Thompson v. Brown, 4 Johns. Ch. 619. In Seymour v. Seymour, 4 Johns. Ch. 409, the chancellor refused to take jurisdiction, and interfere with the ordinary exercise of the powers of the surrogate in the settlement of the accounts of administrators and the distribution of the estate, without some special reasons set forth in the bill. The province of the court of chancery was to aid by a discovery, and when necessary by injunction, the courts of surrogates in the exercise of their general powers, and the jurisdiction should be regarded *rather as auxiliary than concurrent*. But there is no action now possible for a discovery, and the plaintiffs do not make a case for or ask for an injunction. It is not optional with executors and administrators accounting on their own and independent grounds of equitable interference. This continued existence of an active equitable jurisdiction results in some instances from positive provisions of the legislation, in others from the merely permissive terms of the statute defining the powers of probate courts, or perhaps from the absence of any negative or sufficiently mandatory language.[1]

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motion, or creditors, legatees, or next of kin calling them to an accounting, to pass by the surrogate's court having ample jurisdiction in the premises, and, without assigning any special reasons, proceed by formal action in equity, making all persons whose presence is necessary to a final accounting parties to the action. It would be unreasonable to subject the parties to the vexation and delay, and the estate to the unnecessary costs, of such a litigation: Adams v. Adams, 22 Vt. 50."

Ohio.— Piatt v. Longworth's Ex'rs, 27 Ohio St. 159, 186: "Since the act of 1853, the probate court has exclusive jurisdiction of the settlement of the accounts of executors and administrators. *When that remedy proves inadequate, the aid of a court of equity may be invoked.*"

Rhode Island.— Blake v. Butler, 10 R. I. 133, 137, 138. An administrator had filed his accounts in the probate court, and a final decree of settlement and distribution had been made therein. The plaintiffs — next of kin — appealed to the supreme court under the statute. Pending this appeal the plaintiffs commenced a suit in equity in the supreme court against the administrator, charging fraud in the administration and in his accounts, and praying for general relief, an accounting, and settlement. The supreme court held that it had no jurisdiction of the suit under such circumstances; that the plaintiff could obtain full relief in the probate court or on the appeal; that the jurisdiction in equity is only concurrent with that of the probate court, and the jurisdiction of the probate court having first attached thereby became, under a general principle, exclusive. According to this decision, the doctrine adopted in Rhode Island is, perhaps, not in full harmony with the proposition formulated in the text; it appears that equity has an active concurrent jurisdiction over administrations, and may regulate and decree the settlement of decedents' estates. Still, the state can hardly be regarded as fully belonging to the third class, described in the next succeeding paragraph.

[1] The following states may properly be placed in this division: —

Mississippi.— Walker v. State, 53 Miss. 532, 535; Bank of Miss. v. Duncan, 52 Miss. 740; Brunini v. Pera, 54 Miss. 649; Evans v. Robertson, 54 Miss. 683. In Walker v. State, 53 Miss. 532, the court held that under the constitution of 1832, the rule was settled that chancery had no jurisdiction of administration, but that the jurisdiction belonged exclusively to courts of probate. Under the present constitution, such original jurisdiction has been restored to courts of equity, and they may entertain suits for administration proper, and also suits upon administration bonds against the administrator or executor and his sureties. The same ruling is repeated in the other cases cited, and a long line of previous decisions is of course overruled.

§ 351. **Special Subjects of Equitable Cognizance in Aid of Administrations.**— While the original jurisdiction of equity over the subject of administration in general is thus abolished in so many states, the power to interfere for some special and partial purpose, or to grant some special and partial relief in the course of the administration and settlement of decedents' estates, exists in all the commonwealths as a part of the general functions belonging to equity courts. The jurisdiction over estates, interests, and primary rights purely equitable, and to administer equitable remedies, is nowhere lost merely because the interest, right, or remedy grows out of or is connected with the estate of a deceased person which is in the course of administration, even though the administration proper, the accounting, and final settlement are carried on under the exclusive supervision of another tribunal. In all such cases the jurisdiction must, of course, be based upon some distinctive and independent ground or matter of equitable cog-

New Jersey.— Frey v. Demarest, 16 N. J. Eq. 236, 238, 239. In this carefully considered case, the court expressly holds that the concurrent jurisdiction of equity with the probate courts over the administration of assets has long been well settled, and may be exercised on behalf of legatees, next of kin, creditors, and executors or administrators. The suit by a next of kin for his share was established in the reign of Charles II. In New Jersey, the equity jurisdiction over the accounts of executors and administrators, and to enforce the claims of creditors, legatees, and next of kin, has been repeatedly affirmed and is constantly exercised; it is well settled, and also its limitations; citing Meeker v. Marsh, 1 N. J. Eq. 198; King v. Ex'rs of Berry, 3 N. J. Eq. 44, 261; Salter v. Williamson, 2 N. J. Eq. 480, 489, 35 Am. Dec. 513; Smith v. Moore's Ex'rs, 4 N. J. Eq. 485; Van Mater v. Sickler, 9 N. J. Eq. 483; Clark v. Johnston, 10 N. J. Eq. 287. To this explicit statement of the doctrine, the court adds a conclusion which may seem somewhat inconsistent with it: "But, unless for some special cause, a court of equity will not interfere with the ordinary jurisdiction of the probate court in the settlement of the accounts of administrators or executors."

Rhode Island.— Blake v. Butler, 10 R. I. 133, 137, 138. See the statement of this case and comments upon it in the note under the preceding paragraph. It appears that in Rhode Island the equitable jurisdiction of the supreme court is concurrent, and of course may be exercised; but if the probate court has already taken cognizance of a particular administration, equity will not then interfere, unless for some special and exceptional reason, but will leave the matter under the exclusive control of the probate tribunal.

nizance, and its exercise may then result in a remedy which is a material aid to a pending administration, or which removes an impediment from the final settlement of an estate; as, for example, the construction of a will containing trust provisions, the enforcement of trusts created by a will, the establishment of a will lost or fraudulently destroyed, the canceling and setting aside a fraudulent transfer made by an executor or administrator, and the like. While these and similar instances of the reliefs which may always be furnished by courts of equity are not in any sense parts of or derived from the original jurisdiction over administrations, and have not therefore been withdrawn from the courts by the legislation on the subject,[a] yet they may properly be regarded as incidental and auxiliary to that jurisdiction, even where it has been exclusively intrusted to the probate tribunals. In some of the states belonging to the second division as described above, where the general equity jurisdiction over administrations is not absolutely abolished, but is rather suspended or dormant, when such a suit is properly brought to obtain a particular relief which necessarily operates to aid some pending administration, or to remove some obstacle from its completion, the rule is settled, in accordance with a familiar principle,[1] that the court, having thus acquired a partial jurisdiction over the subject-matter, or for a partial purpose, will go on and decree full and final relief. The court will therefore, in addition to the particular remedy demanded, take control of the entire administration; will even withdraw it from the probate court if already begun therein, and to that end will enjoin all further proceedings before such tribunal, and will order a final accounting and decree a final settlement and distribution, whether the deceased died testate or intestate.[2]

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[1] See *ante*, chap. II., sec. iii., §§ 231–243.

[2] *Alabama.*— Pearson v. Darrington, 21 Ala. 169, 176, holds that equity has jurisdiction of a suit brought to settle the accounts of complicated transactions entered into by an administrator, and to enforce the due execution

(a) See, by way of illustration, Howell v. Moores, 127 Ill. 67, 19 N. E. 863, citing the text; *ante*, § 280.

§ 352. Any discussion at present of the cases in which a court of equity may thus interfere and grant particular reliefs connected with a pending administration, which will operate in aid of its complete settlement, would necessarily require me to anticipate many subjects properly belonging to subsequent portions of this work; I have, therefore, for the purpose of more clearly explaining the statements of the preceding paragraph, merely placed in the foot-note a few examples which will sufficiently illustrate the meaning of the text.[1] There are a few states in which, by the opera-

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of trusts created by a will; and when it takes jurisdiction in such a case by the commencement of a suit, the whole administration is thereby withdrawn from the probate court: Cowles v. Pollard, 51 Ala. 445, 447. When the trusts of a will are doubtful, equity has jurisdiction to construe the will and to direct the executor in the execution of its provisions: Sellers v. Sellers, 35 Ala. 235; Trotter v. Blocker, 6 Port. 269. And when chancery takes jurisdiction upon any such independent ground of equitable cognizance, it will retain the entire administration and decree a final settlement of the estate. In such a case the court of equity will apply the same rules of law concerning the settlement of estates which would govern the probate court, but in its procedure will follow the methods and rules of chancery practice: Stewart v. Stewart, 31 Ala. 207; Wilson v. Crook, 17 Ala. 59; Hunley v. Hunley, 15 Ala. 91; Hall v. Wilson, 14 Ala. 295; Taliaferro v. Brown, 11 Ala. 702.

New Jersey.— Youmans v. Youmans, 26 N. J. Eq. 149; and Mallory v. Craige, 15 N. J. Eq. 73. In a suit properly brought for the construction of a will, all parties being before the court, a final accounting by the executor and settlement of the estate will be decreed.

[1] This jurisdiction, based upon distinct and independent grounds of equitable cognizance, to grant remedies which will more or less directly aid, or remove obstacles from, a pending administration is well settled, and constantly exercised for the following purposes, among others: To construe doubtful provisions of a will, and to direct the executors with respect to their duties when a trust is created by it; but there is no such equitable jurisdiction to interpret a will — or a deed — which only deals with and disposes of purely legal estates or interests, and which makes no attempt to create any trust relations with respect to the property donated. This special jurisdiction to interpret a will is wholly an outgrowth and application of the general power over trusts: Chipman v. Montgomery, 63 N. Y. 221, 230; Bailey v. Briggs, 56 N. Y. 407; Post v. Hover, 33 N. Y. 593, 602, 30 Barb. 312, 324; Bowers v. Smith, 10 Paige, 194; Woodruff v. Cook, 47 Barb. 304; Onderdonk v. Mott, 34 Barb. 106; Walrath v. Handy, 24 How. Pr. 353; Cowles v. Pollard, 51 Ala. 445, 447; Youmans v. Youmans, 26 N. J. Eq. 149; Strubher v. Belsey, 79 Ill. 307, 308; Whitman v. Fisher, 74 Ill. 147; Simmons v. Hendricks, 8 Ired. Eq. 84, 85, 86, 55 Am. Dec. 439.

tion of peculiar and mandatory language of the statutes, certain other subjects which belong to the equitable jurisdiction in its original form have been withdrawn from the cognizance of equity courts, and given into the exclusive control of special tribunals, ordinarily to those having probate powers; as, for example, the assignment of dower, and the partition of real estate. These instances, however, are so few and comparatively unimportant that they do not substantially affect the general system of equitable jurisdiction existing throughout the country, and their consideration

The doctrine is clearly and concisely stated by Allen, J., in the recent case of Chipman v. Montgomery, 63 N. Y. 221, and I quote a short passage from his opinion at page 230: "The rule is, that, to put a court of equity in motion, there must be an actual litigation in respect to matters which are the proper subjects of the jurisdiction of that court as distinguished from a court of law. . . . It is by reason of the jurisdiction of courts of chancery over trusts that courts having equitable powers as an incident of that jurisdiction take cognizance of and pass upon the interpretation of wills. They do not take jurisdiction of actions brought solely for the construction of instruments of that character, or when only legal rights are in controversy. Judge Folger, in Bailey v. Briggs, 56 N. Y. 407, well expresses the rule in these words: 'It is when the court is moved on behalf of an executor, trustee, or *cestui que trust*, and to insure a correct administration of the power conferred by a will, that jurisdiction is had to give a construction to a doubtful or disputed clause in a will. The jurisdiction is incidental to that over trusts.' This is in accord with all the cases in which the question has been considered by the courts in this state." Suits based upon the actual fraud, misconduct, waste, or misappropriation of funds by the administrator or executor in the performance of his fiduciary duties, either to set aside transfers fraudulently made by him, or decrees of the probate court fraudulently obtained, or to reach property under his control belonging to the estate: Clark v. Henry's Adm'rs, 9 Mo. 336; Freeman v. Reagan, 26 Ark. 373, 378; Haag v. Sparks, 27 Ark. 594.

Suits to establish a will which had been fraudulently destroyed: Harris v. Tisereau, 52 Ga. 153, 159–163, 21 Am. Rep. 242, holds that equity has full jurisdiction in all cases of fraud, except fraud in the execution of a will, and this includes fraud in the destruction of a will, notwithstanding the jurisdiction over administrations given to the probate court. Suits to aid or remove an obstacle from the due course of administration, either by establishing or setting aside a settlement made by the decedent upon his wife, and by determining her rights under it, and to the estate: Campbell's Appeal, 30 Pa. St. 298. A husband had executed a post-nuptial settlement upon his wife, and afterwards died, leaving a will. The widow elected not to take under the will, claiming her dower and share of the personal property as though her husband had died intestate. She also brought suit in equity to set aside will be postponed to a subsequent chapter. The radical changes in the doctrines concerning trusts made by the legislation of several states belong rather to the equity jurisprudence than to the jurisdiction, and they will be fully described in the division of this work which treats of equitable estates.

§ 353. **States Which have Adopted the Reformed System of Procedure.**— In dealing finally with the states composing this fourth class, I shall no longer inquire into the *extent* of the equitable jurisdiction as compared with that of the English court of chancery. The only question which now remains for consideration is,— assuming that either a full or a limited equitable jurisdiction had been conferred by the constitution or the statutes upon the courts of any state belonging to this class,— what is the effect produced upon the nature, extent, and exercise of such jurisdiction by the reformed procedure, which has abolished all distinctions between actions at law and suits in equity, and which provides that all rights, legal and equitable, shall be maintained, and all remedies, legal and equitable, shall be obtained, by means of the one civil action? It would be impossible, and indeed wholly unnecessary, for me to follow the course of judicial discussion and decision upon this ques-

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the post-nuptial settlement on account of fraud. The equitable jurisdiction was sustained; the decree would remove an obstacle to the settlement and distribution of the estate by the probate court, and it was not an invasion of the jurisdiction given to that tribunal over administration. And in Carmichael v. Browder, 3 How. (Miss.) 252, a portion had been given to a wife by a marriage contract, and afterwards a legacy by her husband's will, which the executor claimed was intended to be in satisfaction of the portion, but the widow to be in addition thereto. A suit in equity to determine the rights of the widow under the nuptial contract and the will, and in the meantime to restrain her from suing in the probate court to recover her legacy, was sustained. Suits to recover distributive shares: In New Jersey, and perhaps in some other states, the rule still prevails that a next of kin may sue the administrator in equity to recover his distributive share of the estate, although the courts of law and the orphans' court also have jurisdiction if there has been a decree for a distribution made in the administration; when no decree of distribution has yet been made, the only remedy of the next of kin is by such suit in equity: Dorsheimer v. Rorback, 23 N. J. Eq. 46; Frey v. Demarest, 16 N. J. Eq. 236, 238.

tion in each individual state; all that I can do is to formulate, in as brief and comprehensive terms as possible, the conclusions which have been reached by the courts in all the states of this class.

§ 354. **Its General Effect on the Jurisdiction.**— Whenever the judges of any state have dealt with this subject generally, whenever they have in general terms described the total effect of the reformed procedure upon the equity jurisprudence and jurisdiction, they have all used language of the same import and leading to the same result. From this entire course of judicial decision and *dicta* in all the states, the following proposition may be formulated as expressing the unanimous conclusion of the courts with respect to the general effect of the reformed procedure. The reformed procedure, in its abolition of all distinction between actions at law and suits in equity; in its abrogation of the common-law forms of action, and its institution of one " civil action " for all remedial purposes; in its allowing both legal and equitable rights to be maintained, and legal and equitable remedies to be conferred in combination by the single " civil action; " and in the uniform rules which it has established for the regulation of this civil action whenever and for whatever purposes it may be used,— purports to deal with, and does in fact deal with, the *procedure* alone, with the mere instrumentalities, modes, and external forms by which justice is administered, rights are protected, and remedies are conferred. The new system was not intended to affect, and does not affect, the differences which have heretofore existed, and still exist, between the separate departments of " law " and " equity; " it was not intended to affect, and does not affect, the settled principles, doctrines, and rules of equity jurisprudence and equity jurisdiction. To sum up this result in one brief statement, all equitable estates, interests, and primary rights, and all the principles, doctrines, and rules of the equity jurisprudence by which they are defined, determined, and regulated, remain absolutely untouched, in their full force and extent, as much as though a separate court of chancery were still preserved. In like manner all equitable remedies and remedial rights,— that is, the equitable causes of action, and the rights to obtain the reliefs appropriate therefor,— and the doctrines and rules of equity jurisprudence which define and determine these remedies and remedial rights, and the doctrines and rules of equity jurisdiction which govern and regulate, *not the mere mode* of obtaining them, but the *fact* of obtaining such remedies, also remain wholly unchanged, and still control the action of courts in the administration of justice. While the external distinctions of form between suits in equity and actions at law have been abrogated, the essential distinctions which inhere in the very nature of equitable and legal primary or remedial rights still exist as clearly defined as before the system was adopted, and must continue to exist until the peculiar features of the common law are destroyed, and the entire municipal jurisprudence of the state is transformed into equity. If, therefore, the facts stated in the pleadings show that the primary rights, the cause of action, and the remedy to be obtained are legal, then the action is one at law, and falls within the jurisdiction at law.[a] If, on the other hand, the facts stated show that the primary rights, or the cause of action, or the remedy to be obtained are equitable, then the action itself is equitable, governed by doctrines of the equity jurisprudence, and falling within the equitable jurisdiction of the court. It should be carefully observed, however, that, under the reformed system of procedure, the same action may be both legal and equitable in its nature, since it may combine both legal and equitable primary rights, causes of action, defenses, and remedies. It is this fact which, more than any other, has tended to produce whatever confusion may have arisen in the actual workings of the new system. I have collected and arranged in the foot-note cases selected

(a) The text is quoted in Myers v. Sierra Val. Stock & Agric. Assn., 122 Cal. 669, 55 Pac. 689, holding that an action to enforce the statutory right of contribution among stockholders is at law.

from the decisions of various states, by which the foregoing general conclusions are fully sustained.[1]

§ 355. **Its Particular Effects.**— While this unanimous conclusion of the courts is, in general, correct; while, when we look at the effects of the reformed procedure as a whole,—*en masse*,—it is true that equity and the law remain unchanged,—still, this proposition is not true in every particular; there are some important and necessary limitations.

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[1] My limits of space will not permit of much extended citation from judicial opinions, and I shall only quote a few passages which state the doctrines upon which the conclusions of the text are founded in a peculiarly clear and forcible manner. I have collected these cases according to the states, arranged in alphabetical order.

Arkansas.— Talbot v. Wilkins, 31 Ark. 411, 422; Gantt's Dig., §§ 4461, 4463, 4464.

California.— De Witt v. Hays, 2 Cal. 463, 468, 56 Am. Dec. 352, per Murray, C. J.; Smith v. Rowe, 4 Cal. 6; Grain v. Aldrich, 38 Cal. 514, 99 Am. Dec. 423; Wiggins v. McDonald, 18 Cal. 126; Bowen v. Aubrey, 22 Cal. 566, 569; White v. Lyons, 42 Cal. 279, 282. In two of these cases the whole theory, both in its positive and its negative aspects, was stated in so clear a manner that I may be permitted to make short extracts from the opinions, especially as other cases have, from necessity, only repeated the same conclusions. In De Witt v. Hays, 2 Cal. 463, 468, 56 Am. Dec. 352, Mr. C. J. Murray said: "The legislature, in providing that 'there shall be but one form of civil action,' cannot be supposed to have intended at one fell stroke to abolish all distinction between law and equity as to actions. Such a construction would lead to infinite perplexities and endless difficulties. . . . So cases legal and equitable have not been consolidated; and though there is no difference between the form of a bill in chancery and a common-law declaration under our system, where all relief is sought in the same way from the said tribunal, the distinction between law and equity is as naked and broad as ever. To entitle the plaintiff to the equitable interposition of the court, he must show a proper case for the interference of a court of chancery, and one in which he has no adequate or complete relief at law." In White v. Lyons, 42 Cal. 279, 282, Mr. Justice Crockett said: "Under the code there is but one form of action in this state. . . . If the facts stated are such as address themselves to the equity side of the court, the appropriate relief will be granted by the court sitting as a court of equity. On the other hand, if the facts alleged are purely cognizable in a court of law, the proper relief will be administered in that form of proceeding."

Indiana.—Matlock v. Todd, 25 Ind. 128, 130, per Elliott, J.; Woodford v. Leavenworth, 14 Ind. 311, 314, per Worden, J.; Emmons v. Kiger, 23 Ind. 483, 487; Troost v. Davis, 31 Ind. 34, 39; Scott v. Crawford, 12 Ind. 411.

Iowa.— Claussen v. Lafrenz, 4 G. Greene, 224, 225–227; Kramer v. Rebman, 9 Iowa, 114; Laird v. Dickerson, 40 Iowa, 665, 669; Sherwood v. Sherwood, 44 Iowa, 192.

Kansas.— Shoemaker v. Brown, 10 Kan. 383, 390; Sattig v. Small, 1 Kan. 170, 175.

Kentucky.— Garret v. Gault, 13 B. Mon. 378, 380; Martin v. Mobile & O. R. R., 7 Bush, 116, 124; Richmond, etc., T. Co. v. Rogers, 7 Bush, 532, 535; Hord v. Chandler, 13 B. Mon. 403; Hill v. Barrett, 14 B. Mon. 67.

Minnesota.— Gates v. Smith, 2 Minn. 30, 32; Guernsey v. Am. Ins. Co., 17 Minn. 104, 108; Montgomery v. McEwen, 7 Minn. 351.

Missouri.— Henderson v. Dickey, 50 Mo. 161, 165; Lackland v. Garesche, 56 Mo. 267, 270; Magwire v. Tyler, 47 Mo. 115, 128; Meyers v. Field, 37 Mo. 434, 441; Richardson v. Means, 22 Mo. 495, 498; Maguire v. Vice, 20 Mo. 429; Rogers v. Penniston, 16 Mo. 432; and see also Curd v. Lackland, 43 Mo. 139; Wynn v. Cory, 43 Mo. 301; Gray v. Payne, 43 Mo. 203; Bobb v. Woodward, 42 Mo. 482, 487; Peyton v. Rose, 41 Mo. 257, 262; Gott v. Powell, 41 Mo. 416; Reed v. Robertson, 45 Mo. 580; Rutherford v. Williams, 42 Mo. 18, 23; Fithian v. Monks, 43 Mo. 502, 517.

Nebraska.— Wilcox v. Saunders, 4 Nebr. 569, 587.

Nevada.— Crosier v. McLaughlin, 1 Nev. 348; Champion v. Sessions, 1 Nev. 478; Sherman v. Clark, 4 Nev. 138, 97 Am. Dec. 516; Conley v. Chedic, 6 Nev. 222.

New York.— Reubens v. Joel, 13 N. Y. 488, 493, per S. L. Selden, J.; Voorhis v. Child's Ex'rs, 17 N. Y. 354, 357–362, per S. L. Selden, J.; Peck v. Newton, 46 Barb. 173, 174; Cole v. Reynolds, 18 N. Y. 74, 76; Lattin v. McCarty, 41 N. Y. 107, 110, per Hunt, C. J.; Cropsey v. Sweeney, 27 Barb. 310; Dobson v. Pearce, 12 N. Y. 156, 165, 62 Am. Dec. 152; Crary v. Goodman, 12 N. Y. 266, 268, 64 Am. Dec. 506; N. Y. Cent. Ins. Co. v. Nat. Protect. Ins. Co., 14 N. Y. 85, 90; Bidwell v. Astor Ins. Co., 16 N. Y. 263, 267; Phillips v. Gorham, 17 N. Y. 270, 273, 275; Laub v. Buckmiller, 17 N. Y. 620, 626; N. Y. Ice Co. v. Northwest Ins. Co., 23 N. Y. 357, 359, 360; Brown v. Brown, 4 Rob. (N. Y.) 688, 701; Grinnell v. Buchanan, 1 Daly, 538; Ireland v. Nichols, 1 Sweeny, 208; Wright v. Wright, 54 N. Y. 437, 442; Giles v. Lyon, 4 N. Y. 600; Anderson v. Hunn, 5 Hun, 79; Barlow v. Scott, 24 N. Y. 40, 45; De Hart v. Hatch, 3 Hun, 375, 380; Wilcox v. Wilcox, 14 N. Y. 575, 579, 581. In the first two cases above cited (Reubens v. Joel, 13 N. Y 488; Voorhis v. Child's Ex'rs, 17 N. Y. 354), Mr. Justice S. L. Selden undoubtedly carried this principle of interpreting the codes of procedure altogether too far. By his theory not only the inherent distinctions between law and equity are retained, but all the differences of external form between suits in equity and actions at law, and even among the various kinds of legal actions, are substantially preserved. While his views on this point have been rejected by all the authoritative decisions, his statement of the effect of the new system upon what is essential and inherent in the equity jurisprudence and jurisdiction is both accurate and admirable. From this long list of New York decisions I will make one or two short quotations. Lattin v. McCarty, 41 N. Y. 107, is a very leading and authoritative case, because its facts presented the question in the most direct manner. Mr. C. J. Hunt said (p. 109): "Assuming that the complaint does contain two causes of action, as is insisted, the judgment was still erroneous. The argument principally relied upon to sustain the demurrer is

When we descend from such a general survey of the entire domain, and make a close inspection of each portion in detail, we shall find that some modifications have been made in the body of equity jurisprudence. This result was in fact

this, that the two causes of action are of different characters, one an action of ejectment, being an action at law, the other an action to set aside a deed as fraudulent, and of an equitable nature; that the latter may be tried by the court, while in the former the party is entitled to have his case passed upon by a jury. The codifiers labored assiduously to anticipate and to overrule this objection." He cites certain sections of the code, and proceeds: "In these provisions and in others, the distinction between legal and equitable causes of action is recognized. There is no attempt to abolish this distinction, which would be quite unavailing. The attempt is to abolish the distinction between the forms of action and the modes of proceeding in the several cases. The difficulty under consideration has been expressly overruled by this court in the cases that I shall presently cite." He cites several cases, all of which are placed in the above list. The case of Wright v. Wright, 54 N. Y. 437, is also a very instructive one. The action was by a wife against her husband upon a promissory note given by him to her before the marriage, and in contemplation thereof. The complaint was in the usual form of an action on a note, but stating the relation between the parties, and how the note was given. Reynolds, J., said (p. 442): "While it is admitted that the rights of the plaintiff could be enforced by a suit in equity, yet it is insisted that this, being an action at law, cannot be maintained by a married woman against her husband. It might be asked *by what authority the defendant names this an action at law.* What additional allegation in the complaint would have enabled the defendant to designate it as a suit in equity? While regard is still to be had in the application of legal and equitable *principles*, there is not of necessity any difference in the mere form of procedure so far as the case to be stated in the complaint is concerned. All that is needful is to state the facts sufficient to show that the plaintiff is entitled to the relief demanded; and it is the duty of the court to afford the relief without stopping to speculate upon the name to be given to the action. These principles have been frequently acted upon by the court. . . . When, as in our system, a single court has jurisdiction both in law and in equity, and administers justice in a common form of procedure, the two jurisdictions of necessity became to some extent blended. This must be especially the result when the forms of pleading and proceeding are alike." I know of no opinion which more accurately and completely expresses the true intent and effects of the reformed procedure than this. In Wilcox v. Wilcox, 14 N. Y. 575, 579, 581, it was decided that individual judges acting in chambers have all the powers and functions which were possessed and exercised by the chancellor in chambers.

Ohio.— Klonne v. Bradstreet, 7 Ohio St. 322, 325; Lamson v. Pfaff, 1 Handy, 449, 452; McCrory v. Parks, 18 Ohio St. 1; Ellithorpe v. Bucks, 17 Ohio St. 72; Clayton v. Freet, 10 Ohio St. 544, 546; Goble v. Howard, 12 Ohio St. 165, 168; Hager v. Reed, 11 Ohio St. 626, 635; Dixon v. Caldwell, 15

inevitable. Certain equitable interests and primary rights, and certain equitable remedies and remedial rights, were so essentially bound up with and dependent upon the *forms* peculiar to the suit in equity, and to the administration of justice by the methods of chancery, that any abolition of the peculiar forms must of necessity work some change in this class of interests, rights, and remedies. It is easy to say that the distinctive modes of equity procedure are alone abrogated by the legislature, while the principles, doctrines, and rules of the equity jurisprudence and jurisdiction are wholly unaffected; but in the very nature of things this is simply impossible with respect to all the details of the system. Some particular changes in equity jurisprudence

Ohio St. 412, 415, 86 Am. Dec. 487. In the last-named case, the court held that the code had abolished the distinction between actions at law and suits in equity, and had substituted in their place one form of "civil action;" but the rights and liabilities of parties, both legal and equitable, as distinguished from the mode of procedure, remain the same since as before the adoption of the code.

Oregon.— Hatcher v. Briggs, 6 Oreg. 31, 41.

Wisconsin.— Bonesteel v. Bonesteel, 28 Wis. 245, 250; Dickson v. Cole, 34 Wis. 621, 625; Mowry v. Hill, 11 Wis. 146, 149; Leonard v. Rogan, 20 Wis. 568; Supervisors v. Decker, 30 Wis. 624, 626–630; Turner v. Pierce, 34 Wis. 658, 665; Lawe v. Hyde, 39 Wis. 345; Noonan v. Orton, 21 Wis. 283; Horn v. Ludington, 32 Wis. 73. From these and other cases which might be cited, it is plain that the supreme court of Wisconsin, while maintaining the doctrine that law and equity are unaffected by the reformed procedure, has also preserved in actual practice more of the external distinctions of form between equitable suits and legal actions than has been done by the courts of any other state where the new system of procedure is adopted.

There are two other states in which law and equity are blended, and are administered by means of the same kind of action, with the same forms of pleading and rules of practice, although the peculiar system known as the "reformed procedure" does not prevail therein. These states are Louisiana and Texas, and they should properly be included in this fourth class.

Louisiana.— The "equity" recognized in this state is the power of the court to decide according to natural justice in all cases where the positive law is silent. See remarks, *ante*, § 345, in note; Welch v. Thorn, 16 La. 188, 196; Kittridge v. Breaud, 4 Rob. (La.) 79, 80, 39 Am. Dec. 512; Clarke v. Peak, 15 La. Ann. 407, 409.

Texas.— Ogden v. Slade, 1 Tex. 13, 15; Smith v. Clopton, 4 Tex. 109, 113; Spann v. Stern's Adm'rs, 18 Tex. 556; Seguin v. Maverick, 24 Tex. 526, 532, 76 Am. Dec. 117; Herrington v. Williams, 31 Tex. 448, 460; Jones v. McMahan, 30 Tex. 719, 728; Newson v. Chrisman, 9 Tex. 113, 117; Smith v.

and jurisdiction have therefore been made; they have been distinctly recognized and unqualifiedly admitted by the courts; but their necessary connection with the general effects produced by the reformed procedure has not always been clearly perceived and announced. I shall describe the most important of these instances, which must be regarded as exceptions to or limitations upon the general propositions contained in the last preceding paragraph.

§ 356. **On Certain Equitable Interests.**—The first and most palpable of these necessary changes is the complete abrogation of a certain class of equitable primary rights, and the transformation of them into strictly legal rights. This result may not, under the circumstances, be of much practical importance, but it certainly exists. Prior to the codes,

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Smith, 11 Tex. 102, 106; Gross v. McClaran, 8 Tex. 341, 344; Coles v. Kelsey, 2 Tex. 541, 553, 47 Am. Dec. 661; Carter v. Carter, 5 Tex. 93, 100; Wells v. Barnett, 7 Tex. 584, 586; Purvis v. Sherrod, 12 Tex. 140, 159. The peculiar system of administering justice, with respect to the distinctions between law and equity which prevails in Texas, can only be fully understood by an examination of these decisions. I add a single quotation from an early case. In Smith v. Clopton, 4 Tex. 109, 113, Hemphill, C. J., said: "Before the introduction of the common law, the distinction between law and equity was altogether unknown. The parties stated their causes of complaint and grounds of defense, and on the allegations and proofs such relief was afforded as they were entitled to under any and all the laws of the land, without reference to that peculiarity of the English system of jurisprudence which renders the rights of parties, or at least their reliefs, dependent not only upon the facts of their case, but also upon the form in which redress was sought. Upon the introduction of the common law, the intention of the legislature is manifest to prevent such distinction from being recognized, at least, to an extent which would deprive parties of any relief to which they may be entitled under the rules and principles of either law or equity. By the constitution of the state, and by subsequent legislation, the distinction between these two systems is, in a great measure, if not totally, disregarded. . . . The only inquiry, then, to be made at the institution of a suit is, whether the facts of the case are such as to entitle a party to a judgment in his favor in either law or equity; and if he have rights cognizable by either, such relief will be adjudged by the court as the nature of the case demands. The rule that courts of equity will interfere only where the party is remediless at law has but little application under a system in which the litigants in a suit can demand and obtain all the relief which can be granted by either courts of law or of equity." See also the opinion in Coles v. Kelsey, 2 Tex. 541, 553, 47 Am. Dec. 661, and the remarks *ante*, in note under § 345.

the assignment of a thing in action conferred upon the assignee only an equitable primary right, an equitable demand. It is true that the courts of law had, in the course of time, come to recognize and protect this right, by permitting the assignee to sue at law in the name of his assignor, to control the action and judgment, and to receive the proceeds; but still the *right* was no less equitable; the assignee could not assert his own claim by an action at law brought in his own name. In all the states where it prevails, the reformed procedure not only permits but requires the assignee of a thing in action to sue upon it in his own name in any legal action brought for its recovery. This statutory rule removes the last vestige of the equitable nature of the assignee's interest, and transforms his claim into a purely legal one, and thus at one blow abolishes a well-defined division or portion of the equity jurisprudence.[1] The courts have recognized this effect of the legislation in changing the assignee's right from an equitable into a legal one;

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[1] It is idle to say, as has been said by some judges, that the codes merely adopt a rule of practice and extend to legal actions the rule as to parties which had prevailed in courts of equity, and that the right of the assignee given by the codes is only an equitable one (as, for example, in McDonald v. Kneeland, 5 Minn. 352, 365), because,— 1. The assignment of a thing in action conferred a complete *equitable* interest upon the assignee prior to the codes, so that the provision of the codes does not create his equitable right; and 2. The doctrine of equity was not a mere rule regulating the parties to a suit; it treated the assignee as *equitable owner*, as clothed with all the rights of his assignor, and *therefore* permitted him to sue in his own name; but 3. The sole remaining reason why the assignee did not obtain a *legal* right of ownership was found in the purely technical rule which forbade him to sue at law in his own name. When this arbitrary rule was abolished, his right of necessity became a legal one. The *origin* of the rule at law is found in the ancient common-law doctrines concerning *maintenance;* but these had long ceased to be operative in the United States. The true effect of the reformed procedure was perceived and stated by that most able and learned judge Mr. Justice Denio, in Petersen v. Chemical Bank, 32 N. Y. 21, 45, 88 Am. Dec. 298: "The law of maintenance . . . prohibited the transfer of the legal property in a *chose in action,* so as to give the assignee a right of action in his own name. But this is now abrogated; and such a demand . . . may be sold and conveyed, so as to vest in the purchaser all the legal as well as the equitable rights of the original creditor." [a]

(a) See also § 1273.

but they have not perceived, or at least pointed out, its bearing upon the general mode of describing the results produced by the new system. It is hardly necessary to say that this effect is confined to direct assignments of legal things in action. The equitable results arising from the assignment of equitable demands, and from the equitable assignment of funds, and the like are, of course, unmodified.

§ 357. **On Certain Equitable Remedies.**— But there is another and still more important limitation of the general proposition. While it is undoubtedly true that with the exception just mentioned of the right conferred upon the direct assignee of a legal thing in action, all the equitable estates, interests, property, liens, and other primary rights[1] recognized by the equity jurisprudence, and all the principles, doctrines, and rules of that jurisprudence which define them, determine their existence, and regulate their acquisition, transfer, and enjoyment, are untouched and unaffected, it is no less true that some of the equitable remedies and remedial rights belonging to the equity jurisprudence, and coming within the equity jurisdiction, are materially modified, if not indeed destroyed *as equitable remedies and remedial rights,* by the reformed procedure. The union of legal and equitable causes of action in the same suit, and the granting of legal and equitable reliefs by the same judgment, and above all, the granting of ultimate legal relief by the judgment as though some prior auxiliary equitable relief which was a necessary prerequisite had actually been granted, have very much lessened the instances in which it is proper, or even possible, for a party to maintain distinctively equitable suits, enforce purely equitable remedial rights, and obtain strictly equitable remedies according to the settled course of the equitable jurisdiction.[2] The same consequences must result in even a still more marked manner, from the setting up of equitable defenses and counterclaims, and the obtaining affirmative equitable relief against the plaintiffs in actions which at their inception are purely legal. While these provisions of the new system do not absolutely take away the jurisdiction to entertain suits for the enforcement of equitable rights, and, in connection therewith, for the restraining of pending or threatened actions at law, yet they certainly modify that jurisdiction, and in a great number of instances render its exercise unnecessary, improper, and even impossible.[3]

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[1] It might perhaps be said that the case of one of two or more joint debtors dying, and the equitable claim of a creditor against the estate of such decedent, was also an exception. At the common law no indebtedness exists against the estate of a deceased joint debtor; but in equity the creditor has a demand still continuing which he can enforce by an equitable suit, under certain restrictions. In several of the states the creditor is permitted to sue the representatives of the deceased debtor at law, either alone or jointly with the survivors, and without having exhausted his remedies, or even taken any steps against the survivors. In short, the ancient common-law doctrine is wholly abrogated, and the demand against the estate of the deceased joint debtor is transformed into an ordinary legal claim; the original legal debt is unaffected by the death. Great as is this change, I do not include it among those described in the text, because it is not a part of the reformed procedure as an entire system. This particular result is confined to a few of the states, and depends upon peculiar and express causes of their own codes. In the states where such legislation has been adopted, the effect undoubtedly is a change, as above described, in equitable primary rights, by transforming them into strictly legal rights.

§ 358. **On the Inadequacy of Legal Remedies.**— Finally, if the true spirit and intent of the reformed procedure were fully carried out by the courts, I think that in all the states where it prevails the question whether or not an adequate remedy can be obtained at law would cease to have the slightest importance in the actual decision of causes. One of the plainest purposes of the new system is, that if a cause of action is stated in the pleading, the relief to which the plaintiff is entitled should be granted, whether that relief be legal or equitable. A suit should never be dismissed on the ground that a court of equity has no jurisdiction of the matter because the plaintiff has an adequate remedy at law; it should be retained and decided as an action at law, and the adequate legal relief should be awarded.[1] The correctness of this theory is generally admitted, but the courts too often fail to carry the theory into practice.

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[2] One example will sufficiently illustrate this point. A plaintiff sues upon a written agreement, setting forth the facts entitling him to a reformation, and seeking to recover the amount due upon the instrument *as reformed*. The judgment actually rendered is merely a legal judgment for the recovery of debt or damages, the equitable relief of a reformation not being actually decreed, but being assumed; the purely legal relief is awarded exactly as though the prior auxiliary equitable relief had been in terms granted. See Bidwell v. Astor Ins. Co., 16 N. Y. 263, 267; Phillips v. Gorham, 17 N. Y. 270; Caswell v. West, 3 Thomp. & C. 383.

[3] I cannot at present enter into any discussion of this most important question; it will be examined in a subsequent chapter which deals with injunction. It is sufficient now to cite a few cases which illustrate the subject mentioned in the text: Erie R'y Co. v. Ramsey, 45 N. Y. 637, per Folger, J.; Platto v. Deuster, 22 Wis. 482, per Dixon, C. J.; Rogers v. Gwinn, 21 Iowa, 58; Uhlfelder v. Levy, 9 Cal. 607; Anthony v. Dunlap, 8 Cal. 26; Rickett v. Johnson, 8 Cal. 34.

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[1] Mr. Chief Justice Hemphill clearly apprehended this necessary result of the system in Smith v. Clopton, 4 Tex. 109, 113, quoted above, in the note under § 354.

PART SECOND.

PART SECOND.

THE MAXIMS AND GENERAL PRINCIPLES OF EQUITY JURISPRUDENCE, AND THE EVENTS WHICH ARE OCCASIONS OF EQUITABLE PRIMARY OR REMEDIAL RIGHTS.

PRELIMINARY SECTION.

ANALYSIS.

§ 359. Objects, questions, and divisions stated.
§ 360. Equitable *principles* described.
§ 361. Equitable *doctrines* described.
§ 362. *Occasions* of equitable rights.

§ 359. **Questions and Divisions Stated.**— Thus far the discussion has been confined to the equity jurisdiction, or the power of courts to entertain and determine controversies involving equitable estates, interests, and rights, or to award remedies, in pursuance of the doctrines, methods, and procedure of equity. I now proceed to the examination of the doctrines and rules which make up the equity jurisprudence. In the introductory chapter it was shown that equity jurisprudence, considered as a department of the municipal law, as a collection of practical rules administered by the courts, is separated by a natural line of division into two parts, namely, equitable estates, interests, and primary rights, which are all either equitable rights of property or rights analogous to property, and equitable remedies and remedial rights. There are, however, certain elements underlying and running through the entire body of equity jurisprudence, which must be explained and described in all their fullness and force, before either of these two great divisions can be dealt with in a complete and accurate manner. As clearly appears in our preliminary historical sketch, the doctrines and rules of equity jurisprudence are not arbitrary; they are, to a very great extent, based upon and derived from those essential truths of morality, those unchangeable principles of right and obligation which have a juridical relation with and application to the events and transactions of society. These ethical truths do not, however, appear in equity jurisprudence in their purely abstract form. As they must be applied by the courts to juridical relations alone, they have been made to assume a concrete and juridical character, without losing at the same time any of their inherent ethical nature. In fact, these juridical precepts of right and duty are the broad foundations upon which the superstructure of equity jurisprudence has been constructed; they are the sources from which most of those doctrines and rules have been drawn which define and regulate equitable estates, interests, and rights, and control the administration of equitable remedies. A careful examination and full comprehension of these sources — these fundamental principles — are plainly a prerequisite to any complete and accurate knowledge and understanding of the doctrines and rules which result from them.

§ 360. **Equitable Principles.**— The juridical principles[1] of morality which thus constitute the ultimate sources of equitable doctrines and rules are of two classes or grades. Underlying the entire body of equity jurisprudence, extending through every one of its departments, and shaping to a greater or less extent its doctrines concerning almost every important subject, are certain broad comprehensive precepts which are commonly denominated maxims of equity. These maxims are in the strictest sense the *principia,* the beginnings out of which has been developed the entire system of truth known as equity jurisprudence.[a] They are not the practical and final doctrines or rules which determine the equitable rights and duties of individual persons, and which are constantly cited by the courts in their decisions of judicial controversies. They are rather the fruitful germs from which these doctrines and rules have grown by a process of natural evolution. They do not exclusively belong either to the department which treats of equitable estates, property, and other primary rights, nor to that which deals with equitable remedies; their creative and molding influence is found alike throughout both of these departments. Among the most important of these *principia* which have been crystallized into the pithy form of maxims are the following: Equity regards that as done which ought to have been done; equity looks at the intent, rather than the form; equality is equity; he who seeks equity must do equity; he who comes into equity must come with clean hands. While it cannot be said that these and other similar principles have all produced the same or equal effects upon the development of equity jurisprudence, yet it is undeniable that a vast proportion of the actual doctrines and rules which make up the system of equity are necessary inferences from or direct applications of some one or more of these fundamental maxims. It is evident, therefore, that any full and accurate discussion of the doctrines and rules which constitute the two main divisions of equity jurisprudence as heretofore described must be preceded by an examination into the nature, meaning, extent, and effects of these few germinal principles.

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[1] It is important to obtain an accurate notion of the distinction between "principles" and doctrines. "All principles are doctrines, but all doctrines are not principles. Those properly are principles which contain the *principia,* the beginnings or starting-points of evolution, out of which any system of truth is developed:" De Quincey. "Rules" are still more particular in their application and narrow in their scope than doctrines.

(a) The text is quoted in Gavin v. Curtin, 171 Ill. 640, 49 N. E. 523.

§ 361. **Equitable Doctrines.**— In addition to these true *principia,* these principles which run through and affect all parts of equity jurisprudence, there are also certain other comprehensive doctrines which are purely equitable, and largely serve to distinguish the system from the " law." The doctrines to which I refer are neither equitable estates, nor property, nor remedies, nor are they exclusively concerned either with equitable estates and other similar rights, or with equitable remedies; on the contrary, they affect to a greater or less extent both the equitable rights of property and the administration of equitable remedies. It seems expedient, therefore, in order to avoid unnecessary repetition,— even if this arrangement is not essential in any scientific method,— that the investigation of these peculiar doctrines should precede the discussion of equitable estates, interests, and other primary rights, and of equitable remedies. The following are illustrations of the doctrines which constitute this special class: The equitable doctrines concerning penalties and forfeitures; the doctrine concerning priorities; the doctrine concerning notice; the doctrine of election. All of these are very comprehensive in their nature and effects, and are the immediate sources of numerous rules in all branches of equity jurisprudence.

§ 362. **Occasions of Equitable Rights.**—Finally, there are certain facts or events which are the *occasions* of numerous equitable rights, both primary and remedial, and which thus give rise to important doctrines and rules in every branch of equity jurisprudence. These facts and events have sometimes been described as forming a part of the concurrent jurisdiction; but this view, as has already been shown, is superficial and erroneous. The facts and events which are thus peculiarly the occasions of equitable rights are fraud, mistake, and accident. Under the system of classification which I have adopted, these subjects do not exclusively belong either to the department of equitable estates and other primary rights, nor to that of equitable remedies. Although not the sources of rules, like the principles and doctrines mentioned in the foregoing paragraphs, they are the occasions which give rise to a large number of rules, and their examination should, in any proper order, precede the discussion of equitable property and equitable remedies. This second part will therefore be separated into three chapters, of which the first will be devoted to the fundamental maxims of equity, the second to the group of peculiarly equitable doctrines above described, and the third to the special facts and events which are the occasions of many equitable rights and remedies.

CHAPTER I.

THE FUNDAMENTAL PRINCIPLES OR MAXIMS OF EQUITY.

SECTION I.

EQUITY REGARDS THAT AS DONE WHICH OUGHT TO BE DONE.

ANALYSIS.

§ 363. List of equitable maxims.
§ 364. Equity regards as done what ought to be done; its importance.
§§ 365–377. Its true meaning, and its effects upon equitable doctrines.
§§ 366–369. Is the source of equitable property and estates.
§ 366. Sources of legal property or titles described.
§ 367. Effect of an executory contract at law.
§ 368. Effect of an executory contract in equity.
§ 369. Sources of all kinds of equitable property described.
§§ 370–376. The equitable estates which are derived from this principle.
§ 371. Conversion.
§ 372. Contracts for the purchase and sale of lands.
§ 373. Assignments of possibilities; sale of chattels to be acquired in the future; assignments of things in action; equitable assignments of moneys; and equitable liens.
§ 374. Express trusts.
§ 375. Trusts arising by operation of law.
§ 376. Mortgage; equity of redemption.
§ 377. Conclusions.

§ 363. **List of Maxims.**— Those principles which are so fundamental and essential that they may with propriety be termed the *maxims* of equity are the following: Equity regards that as done which ought to be done; equity looks to the intent, rather than to the form; he who seeks equity must do equity; he who comes into equity must come with clean hands; equality is equity; where there are equal equities, the first in time shall prevail; where there is equal equity, the law must prevail; equity aids the vigilant, not those who slumber on their rights, or *Vigilantibus non* *dormientibus, æquitas subvenit;* equity imputes an intention to fulfill an obligation; equity will not suffer a wrong without a remedy; and equity follows the law. It must not be supposed that all these maxims are equally important, or that all have been equally fruitful in the development of doctrines and rules; but it is not an exaggeration to say that he who has grasped them all with a clear comprehension of their full meaning and effects has already obtained an insight into whatever is essential and distinctive in the system of equity jurisprudence, and has found the explanation of its peculiar doctrines and rules.[a] I purpose, in the successive sections of this chapter, to discuss them in the order given above.

§ 364. **First Maxim: Its Importance and General Operation.**[a]— The first maxim in the list has been stated in somewhat varying language by different text-writers, but without any substantial variation in the meaning.[1] I think the following form is both strictly accurate and sufficiently comprehensive in expressing the equitable principle: Equity regards and treats that as done which in good conscience ought to be done. Some writers have failed to apprehend the full significance of this maxim, and have described its effects in altogether a too narrow and partial manner.[2] Others have correctly looked upon it as the very foundation of all distinctively equitable property rights, of all equitable estates and interests, both real and personal.[3] It is in fact the source of a large part of that division of equity jurisprudence which is concerned with equitable property; the doctrines and rules which create and define equitable estates or interests are in great measure derived from its operation. So far from the maxim being confined to express executory contracts, and to those dispositions of property which give rise to an equitable conversion, it has been applied by the most eminent courts to all classes of equities; to every instance where an equitable *ought* with respect to the subject-matter rests upon one person towards another; to every kind of case where an affirmative equitable duty to do some positive act devolves upon one party, and a corresponding equitable right is held by another party.[4] [b] Whenever courts of high authority have dealt with the principle in a narrower manner, and have given to it a more restricted operation and effect, their language, although perhaps very general in its terms, should be taken as confined, and as intended by the court to be confined, to the particular application of the maxim then under judicial investigation.[5]

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[1] "Equity looks upon that as done which ought to have been done:" Story's Eq. Jur., § 64 g; Snell's Equity, 37 (10). "What ought to be done is to be considered as done:" 2 Spence's Eq. Jur. 253; Adams's Equity, 135.

[2] Thus Mr. Justice Story (1 Eq. Jur., § 64 g), and Mr. Snell (Snell's Equity, 37) following him, say: "The true meaning of this maxim is, that equity will treat the subject-matter of a contract, as to collateral consequences and incidents, in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been, not as they might have been, executed. . . . The most frequent cases of the application of the rule are under agreements." This description is merely the substituting one practical result of the principle in the place of the principle itself.

§ 363, (a) The text is cited in Otis v. Gregory, 111 Ind. 504, 13 N. E. 39.

§ 364, (a) Sections 364 *et seq.* are cited in Woodbury v. Gardner, 77 Me. 68, 75.

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[3] Adams's Equity, 135 (6th Am. ed., p. 295): "'What ought to be done is considered in equity as done;' and its meaning is, that whenever the holder of property is subject to an equity in respect of it, the court will, as between the parties to the equity, treat the subject-matter as if the equity had been worked out, and as impressed with the character which it would then have borne. The simplest operation of this maxim is found in the rule that trusts and equities of redemption are treated as estates; but its effect is most obvious in the constructive change of property from real to personal estate, and *vice versa*, so as to introduce new laws of devolution and transfer." The examples given of trusts and equities of redemption plainly show that Mr. Adams's definition was intended to include *all equitable property* as resulting from this single principle. This is also the view of Mr. Spence. He expressly represents all trust and other equitable estates, whether growing out of executory contract creating the trust, or out of a will, or otherwise, as the consequences of this fruitful maxim. See 2 Spence's Eq. Jur. 253 et seq., and also the titles Trusts and Equitable Estates.

[4] Frederick v. Frederick, 1 P. Wms. 710. A person had contracted to become a citizen of London, but died before he had carried this agreement into effect by taking up his freedom. His widow thereupon brought a suit to procure his personal estate to be distributed in accordance with the customs of London, which applied to citizens only, and which prescribed a very different mode of distribution from that which prevailed under the statute

(b) The text is quoted in Sourwine v. Supreme Lodge, 12 Ind. App. 447, 452, 453, 54 Am. St. Rep. 531, 536, 40 N. E. 646; cited, Lynch v. Moser, 72 Conn. 714, 46 Atl. 153; Shipman v. Lord, 58 N. J. Eq. 380, 44 Atl. 215; affirmed, 60 N. J. Eq. 484,. 46 Atl. 1101; Preston v. Russell, 71 Vt. 151, 44 Atl. 115. In Sourwine v. Supreme Lodge, *supra*, 12 Ind. App. 447, 452, 453, 54 Am. St. Rep. 532, 536, 40 N. E. 646, a member of a beneficial association in good standing and entitled under its constitution and bylaws to be transferred from one endowment class to another, requested

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in other parts of England. The court, invoking the maxim, held that the deceased should be regarded as though he were actually a citizen at the time of his death, and that his estate should be distributed in pursuance of the custom. This decision clearly exhibits the universality of the maxim: Burgess v. Wheate, 1 W. Black. 123, 129, 1 Eden, 177; Lechmere v. Earl of Carlisle, 3 P. Wms. 211; Brewer v. Herbert, 30 Md. 301, 96 Am. Dec. 582; McCaa v. Woolf, 42 Ala. 389; Jordan v. Cooper, 3 Serg. & R. 585; Gardiner v. Gerrish, 23 Me. 46; Peter v. Beverly, 10 Pet. 534, 563; Taylor v. Benham, 5 How. 234, 269; Commonwealth v. Martin, 5 Munf. 117, 122; Pratt v. Taliaferro, 3 Leigh, 428; Coventry v. Barclay, 3 De Gex, J. & S. 320, 328, per Lord Chancellor Westbury. In this case the question in dispute was, whether a partner — Bevan — was bound by certain accounts settled with his copartners, or whether he could disregard them, and have a general accounting gone into. By the partnership articles it was stipulated that on a certain day each year the accounts of the whole past year should be made up, presented to all the partners, settled, and signed by each. At the appointed day in one year the accounts were thus made up, and laid before all the firm, except Bevan, settled and signed by them. Bevan was not present, on account of illness, and never signed these accounts, but afterwards saw them, and verbally assented or agreed to their correctness. The same took place on another year. On these facts Lord Westbury said (p. 228): "It is the rule of a court of equity to consider that as done which ought to be done; and if, therefore, I find that the accounts and valuation of July, 1860, at the making of which Mr. Bevan was not present, were afterwards accepted and agreed to by him, I shall hold that the account was in equity signed by him at the time when it was so accepted." Here, it will be seen, this most able judge applied the maxim, not to the title and property in land or chattels, but to a purely personal act, and held that equity would regard such a personal act as done, although in fact it never was done, because it ought to be done. The case is in exact harmony with Frederick v. Frederick, 1 P. Wms. 710.

[5] This is the universal rule for the interpretation of judicial *dicta*, and it is the only mode of avoiding irreconcilable conflict of opinion. The nar-

to be so transferred, and did all that could be required of him to entitle him to enter such class, but his request was wrongfully and arbitrarily refused. After his death, the court, recognizing the flexibility of equitable remedies, and quoting the above passage of the text, granted relief as though the transfer had been effected. For other illustrations of the maxim, see Ames v. Richardson, 29 Minn. 330, 13 N. W. 137; Newkirk v. Marshall, 35 Kan. 77, 10 Pac. 571.

§ 365. **Its Meaning and Effects.**— What is the true meaning of the principle, taken in its most comprehensive and generic sense? and what are its true effects upon the system of distinctive doctrines and rules which constitute the equity jurisprudence? In the first place, it should be observed that the principle involves the notion of an equitable *obligation* existing from some cause; of a present relation of equitable right and duty subsisting between two parties, — a right held by one party, from whatever cause arising, that the other *should* do some act, and the corresponding duty, the *ought* resting upon the latter to do such act. Equity does not regard and treat as done what *might* be done, or what *could* be done, but only what *ought* to be done. Nor does the principle operate in favor of every person, no matter what may be his situation and relations, but only in favor of him who holds the equitable right to have the act performed, as against the one upon whom the duty of such performance has devolved.[1] Wherever between two par-

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row and restricted effect given to the maxim is most frequently found in decisions concerning equitable *conversion;* and it has no other legitimate meaning than that of defining the limits within which the principle can operate in such cases. See Burgess v. Wheate, 1 W. Black. 123, 129, 1 Eden, 177; Craig v. Leslie, 3 Wheat. 563, 577, per Washington, J.; Douglas Co. v. Union Pacific R. R., 5 Kan. 615.

[1] This true meaning of the principle was admirably stated by Sir Thomas Clarke, M. R., in Burgess v. Wheate, 1 W. Black. 123, 129, 1 Eden, 177: "Nothing is looked upon in equity as done but what *ought* to have been done, not what *might* have been done. Nor will equity consider things in that light in favor of everybody; but only of those who had a right to pray it might be done. The rule is, that it shall either be between the parties who stipulate what is to be done, or those who stand in their place." In the last sentence the judge is merely speaking by way of illustration of the case where the right and duty arise from an express executory contract; he has no intention of confining the operation of the maxim to such contracts. While this passage presents the maxim in its true meaning and with its true limitations under all circumstances of its application, there are some other judicial *dicta* which must be carefully confined to the particular facts of the case in which they were uttered, or else they would be quite misleading, and some, perhaps, which do not even admit of this explanation, but must be regarded as essentially erroneous. Thus in the leading American case of Craig v. Leslie, 3 Wheat. 563, 577, a testator, citizen of the United States, devised all his lands to trustees, with direc-

ties, A and B, an "equity" exists with respect to a subject-matter held by one of them, B, in favor of the other, A, then as between these two a court of equity regards and treats the subject-matter and the real beneficial rights and interests of A as though the "equity" had actually been worked out, and as impressed with the character and having

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tions to convert the same into money and pay the proceeds to the testator's brother, who was an alien. The attorney-general of Virginia, in which state the lands were situated, claimed that the lands of the testator had escheated to that state. The only question for decision was, whether, by the doctrine of equitable conversion, the real estate devised by the testator was to be regarded as money, so that the alien legatee could claim and hold the bequest, or whether it remained real estate, and so was liable to an escheat. The court, with a very elaborate examination of the authorities and discussion of the rules upon the subject, held that an equitable conversion had taken place, and the gift was therefore valid as a bequest of personal property. In his opinion Mr. Justice Washington said: "The principle upon which the whole of this doctrine is founded is, that a court of equity, regarding the substance, and not the mere form and circumstances of agreements and other instruments, considers things directed or agreed to be done as having been actually performed, where nothing has intervened to prevent a performance. This qualification of the more concise and general rule that equity considers that to be done which is agreed to be done will comprehend the cases which come under this head of equity." It is evident that the judge is here speaking of the maxim solely in its connection with the particular doctrine of "equitable conversion." He shows no intention of narrowing it, or of stating any qualification upon it, in its application to or effect upon the equity jurisprudence in general. In Douglas Co. v. Union Pac. R. R., 5 Kan. 615, the only question was, whether lands held by the railroad were liable to be taxed for county purposes. The company was in possession of the land under a statute or contract with the United States, but their ultimate right and title to the land depended upon their performance of numerous stringent conditions, none of which were yet performed. By the terms of the contract, all these conditions must be fully performed at the very times specified, and a failure to perform any one within the time forfeited the company's whole right. The county officers invoked the maxim, and claimed that the railroad were equitable owners. The court held that the interest of the company was so conditional, contingent, and uncertain that it was not property susceptible of taxation. This disposed of the whole case. The maxim under discussion plainly had no application, for as yet there was no obligation upon the United States to convey. Equity could not regard anything as done, because there was nothing yet which ought to be done. Notwithstanding this, the court went on as follows: "In equity there is a maxim that equity will consider as done that which ought to be done, and that it will look upon all things agreed to be done as actually performed. As an application of this maxim, equity generally considers that when land is sold on credit, and the deed is to be made when the purthe nature which they then would have borne.[2] When in this proposition it is said that an " equity " exists between the two parties, the meaning is, that some equitable obligation to do some positive act with respect to the subject-matter, arising from a cause recognized by the rules of equity jurisprudence, rests upon B, and a corresponding equitable right to have the act done by B with respect to the same subject-matter springing from the same efficient cause, is held by A. This active relation subsisting between the two parties, a court of equity, partly acting upon its fundamental principle of going beneath the mere external form and appearance of things and dealing with the real fact, the real beneficial truth, and partly for the purpose of making its remedies more complete, treats the resulting rights of A as though the obligation of B had already been performed; regards A, in fact, as clothed with the same ultimate interests in the subject-matter which he would receive and hold if B had actually fulfilled his obligation by doing the act which he ought to do. Of course this interest thus possessed by A is and must be a purely equitable one, recognized by courts of equity alone, since no legal interest in the subject-matter could become vested in A except by the complete performance of his obligation on the part of B,— his really doing the act which his duty bound him to do.

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chase-money is to be paid, that the land at the time the sale is made becomes the vendee's and the purchase-money the vendor's; that the vendor becomes at once the trustee of the vendee with respect to the land, and the vendee the trustee of the vendor with respect to the purchase-money. But this maxim never applies where time is of the essence of the contract, and where the land is subject to absolute forfeiture on failure of some condition of the sale being performed; for there is no necessity in such a case for courts of equity *to resort to any such fiction*," etc. I only wish to notice this very remarkable expression of the court, which represents the operation of this fundamental principle of equity jurisprudence *as a fiction*. If the equitable estate of the vendee in an executory contract for the sale of land is a fiction, then every other species of equitable property and interest must be equally a fiction, for they all stand upon the same principle, and in fact the greater part of equity jurisprudence must be fictitious: See Daggett v. Rankin, 31 Cal. 321, 326, per Currey, J.

[2] See Adams's Equity, 135 (6th Am. ed., p. 295).

§ 366. **Is the Source of Equitable Property — Sources of Legal Property or Titles.**— All kinds of equitable property, as distinguished from legal ownership, are, with perhaps one or two particular exceptions, derived from this fruitful and most just principle. Its full operation can best be understood and appreciated from a brief comparison of the modes in which absolute property — that is, the perfect right of ownership, *dominium* — arises or is acquired at law, with the modes in which the analogous right of property arises according to the doctrines of equity. In the earliest and rudest periods of the common law absolute property could only be acquired *inter vivos* by the accurate observance of certain arbitrary, external forms, or symbolic acts and gestures.[1] Although with an advancing civilization these external and symbolic acts have disappeared, still, down to the present time the only absolute property or right of ownership which the law recognizes, and which courts of law protect by their legal actions and remedies, whether in land or in things personal, must arise and be acquired in certain fixed, determinate methods, which alone constitute the "titles" known to the law,— using that word in its strict and true sense as *means of acquiring* property. Without following some one of these certain modes, no legal property can be obtained or transferred as between persons in their private capacities.[2] The most important of these common-law methods which must be pursued in order that a legal property may be acquired in land are: A conveyance under seal whereby the seisin was transferred; a will; inheritance; marriage whereby a freehold estate for life might be vested in one of the spouses; actual disseisin with an adverse possession during the period prescribed by the statute of limitations; and under very special circumstances, accession.[3] The important modes of acquiring a legal property in things personal are: A true present sale or bailment where the chattel is in existence and capable of immediate manual transfer; a will; a succession in case of intestacy as regulated by the statute of distributions; marriage; adverse possession aided by the statute of limitations; occupancy; and the various acts which are included under the generic term "accession."[4] Unless a person has obtained the legal property in a specific tract of land through some one of the foregoing modes, he cannot as demandant maintain a real action to recover such land, or as lessor of the plaintiff under the ancient practice, or as plaintiff under the modern, maintain an action of ejectment for the same purpose. A legal estate acquired by some legal title is indispensable. Upon the same principle, unless a person has a legal property in a specific chattel, obtained through some mode recognized by the law, he cannot as plaintiff maintain any of the proprietary actions at law for the purpose of recovering the article itself, or its value in money, or damages for an invasion of his ownership, replevin or detinue, trespass or trover. While he may have legal *rights* with respect to the thing, which courts of law will protect, and for the violation of which he may be entitled to appropriate legal remedies, his legal right of property can only arise and exist upon the occasion of certain, determinate acts or events.[5]

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[1] This is true of every system of national law in its earliest, semi-barbarous, and purely customary stage. The "livery of seisin" of the Saxon and ancient common law was identical in principle with the "mancipation" by which complete dominion could alone be transferred in the primitive Roman law, — the early *jus civile*.

[2] As I am speaking only of private relations, I purposely omit all mention of the public modes in which property might be acquired by the state, — escheat, forfeiture, eminent domain, and the like,— and also those semi-public methods allowed by statutes in which property is vested in certain official persons, such as assignees in bankruptcy or insolvency, and the like.

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[3] The case of "alluvion," where the proprietor's land *grows*, as it were.

[4] In all the instances where property is divested and transferred through the agency of some administrative officer,— e. g., a sheriff acting in pursuance of a judicial authority,— the final means of transfer and of acquisition is a sale in case of chattels, and a conveyance in case of land. The only real distinction between these cases and those of ordinary sales and conveyances lies in the person who as vendor or grantor makes the transfer.

[5] The Roman law furnished a complete analogy to this condition in our own jurisprudence. The absolute *dominium*, or property *ex jure quiritum*,

§ 367. **Effect of an Executory Contract at Law.**— What is the effect at law of a contract whereby the owner agrees to sell and convey a designated tract of land, but which is not a true conveyance operating as a present transfer of the legal estate and the legal seisin? It is wholly, in every particular, executory, and produces no effect upon the respective estates and titles of the parties, and creates no interest in nor lien or charge upon the land itself. The vendor remains, *to all intents,* the owner of the land; he can convey it to a third person free from any *legal* claim or encumbrance; he can devise it in the same manner; on his death intestate, it descends to his heirs. The contract in no manner interferes with his legal right to and estate in the land, and he is simply subject to the legal duty of performing the contract, or to the legal liability of paying such damages for its non-performance as a jury may award, which are collectible from his property generally. On the other hand, the vendee acquires no interest nor property right whatever; he can maintain no proprietary nor possessory action for its recovery; his right is a mere thing in action to recover compensation in damages for a breach from the vendor, and his duty is a debt,— an obligation to pay the stipulated price; on his death both this right and this duty pass to his personal representatives, and not to his heirs. In short, the vendee obtains at law no real property nor interest in real property. The relations between the two contracting parties are wholly *personal.* No change is made

the "quiritary property" of the early law, which could only be held by a Roman citizen, and could only be acquired by certain arbitrary modes, as by the symbolic process of mancipation in case of *res mancipi,* or by usucaption, or by a testament executed in strict compliance with the prescribed formalities, or by succession to the agnates in case of intestacy, was the exact analogue to our legal property or legal estates; while the property *in bonis* — the "bonitary property" — gradually permitted by the pretorian legislation, which could be acquired in derogation of these modes, as, for example, by an ordinary sale and delivery without the symbolism of a mancipation, or by a testament executed without a compliance with the ancient forms, or by a succession to the cognates, etc., was substantially identical with our equitable property or equitable estates.

until, by the execution and delivery of a deed of conveyance, the estate in the land passes to the vendee.[a] It is unnecessary to describe the similar legal effects produced by agreements to sell chattels, sales of articles to be acquired by the vendor in the future, and all other contracts which are executory in their nature.

§ 368. **Effect of an Executory Contract in Equity.**— The full significance of the principle that equity regards and treats as done what ought to be done throughout the whole scope of its effects upon equity jurisprudence is disclosed in the clearest light by the manner in which equity deals with executory contracts for the sale of land or chattels, which presents such a striking and complete contrast with the legal method above described. While the legal relations between the two contracting parties are wholly *personal,*— things in action,— equity views all these relations from a very different stand-point. In some respects, and for some purposes, the contract is executory in equity as well as at law; but so far as the interest or estate in the land of the two parties is concerned, it is regarded as executed, and as operating to transfer the estate from the vendor and to vest it in the vendee. By the terms of the contract the land ought to be conveyed to the vendee, and the purchase price ought to be transferred to the vendor; equity therefore regards these as done: the vendee as having acquired the property in the land, and the vendor as having acquired the property in the price. The vendee is looked upon and treated as *the owner of the land;* an equitable estate has vested in him commensurate with that provided for by the contract, whether in fee, for life, or for years; although the vendor remains owner of the legal estate, he holds it as a trustee for the vendee, to whom all the beneficial interest has passed, having a lien on the land, even if in possession of the vendee, as security for any unpaid portion

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(a) The text of Pomeroy on Contracts, § 314, which is almost identical with the above, is quoted in Davis v. Williams, 130 Ala. 530, 537, 89 Am. St. Rep. 55, 60, 30 South. 488, 54 L. R. A. 749.

of the purchase-money.[1] [a] The consequences of this doctrine are all followed out. As the vendee has acquired the full equitable estate,— although still wanting the confirmation of the legal title for purposes of security against third persons,— he may convey or encumber it; may devise it by will; on his death intestate, it descends to his heirs, and not to his administrators;[c] in this country, his wife is entitled to dower in it; a specific performance is, after his death, enforced by his heirs; in short, all the incidents of a real ownership belong to it. As the vendor's legal estate is held by him on a naked trust for the vendee, this trust, impressed upon the land, follows it in the hands of other persons who may succeed to his legal title,— his heirs and his grantees, who take with notice of the vendee's equitable right. In other words, the vendee's equitable estate avails against the vendor's heirs, devisees, and other voluntary assignees, and his grantees with notice;[d] it is only when the vendor has conveyed the land to a third person who is a *bona fide* purchaser for value without notice that other equitable principles come into play, and cut off the vendee's equitable estate.[e] It follows also, as a necessary consequence, that the vendee is entitled to any improvement or increment in the value of the land after the conclusion of the contract, and must himself bear any and all accidental injuries, losses, or wrongs done to the soil by the operations of nature, or by tortious third persons not acting under the vendor. The equitable interest of the vendor is correlative with that of the vendee; his beneficial interest *in the land* is gone, and only the naked legal title remains, which he holds in trust for the vendee, accompanied, however, by a lien upon the land as security when any of the purchase price remains unpaid. This lien, like every other equitable lien, is not an interest *in the land,* is neither a *jus ad rem* nor a *jus in re,* but merely an encumbrance. The vendor is regarded as owner of the purchase price, and the vendee, before actual payment, is simply a trustee of the purchase-money for him. Equity carries out this doctrine to its consequences. Although the land should remain in the possession and in the legal ownership of the vendor, yet equity, in administering his whole property and assets, looks not upon the land as land,— for that has gone to the vendee,— but

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[1] It is a great mistake, opposed to the fundamental notions of equity, to suppose that the equity maxim does not operate, and the vendee does not become equitable owner until and as far as he has actually paid the stipulated price. This erroneous view has sometimes been suggested, and sometimes even held, in a few American decisions; but it shows a misconception of the whole equitable theory. See, merely as an example, some of the *dicta* in Douglas Co. v. Union Pac. R. R., 5 Kan. 615. In truth, the vendee becomes equitable owner of the land, and the vendor equitable owner of the purchase-money, at once, upon the execution and delivery of the contract, even before any portion of the price is paid.[b] It is true that the vendee's equitable estate is encumbered or charged with a lien as security for the unpaid price, and he, therefore, may, by the enforcement of this lien upon his final default in making payment, lose his whole estate, in the same manner as a mortgagor may lose his interest by a foreclosure. But this lien of the vendor is not inconsistent with the vendee's equitable estate, any more than the equitable lien of an ordinary mortgage is inconsistent with the mortgagor's legal estate. See cases cited in note at end of this paragraph.

(a) The text is quoted in Marvin v. Stimpson, 23 Colo. 174, 46 Pac. 673; cited, Peay v. Seigler, 48 S. C. 496, 59 Am. St. Rep. 731, 26 S. E. 885 (vendor's lien); Savings & Loan Soc. v. Davidson, 97 Fed. 696, 38 C. C. A. 365. The text of Pomeroy on Contracts, § 314, which is almost identical with the above, is quoted with approval in Davis v. Williams, 130 Ala. 530, 537, 538, 89 Am. St. Rep. 55, 60, 61, 30 South. 488, 54 L. R. A. 749.

(b) Quoted in Wiseman v. Beckwith, 90 Ind. 185, 190, holding that the equitable estate of the vendee is vested in him by the contract, and cannot be impaired by subsequent legislation. See also Young v. Guy, 87 N. Y. 462.

(c) The text is quoted in Marvin v. Stimpson, 23 Colo. 174, 46 Pac. 673.

(d) The text is cited in Walker v. Goldsmith, 14 Oreg. 125, 12 Pac. 537, dissenting opinion, where it is urged that the vendee's estate should not prevail against the *lis pendens* of a subsequent suit against the vendor. On this question see *post,* § 637, and notes. The text is cited in Woodbury v. Gardner, 77 Me. 68, 75, to the effect that the vendor's sole devisee is the proper party defendant to a suit for specific performance by the vendee. The text is cited in White v. Patterson, 139 Pa. St. 429, 21 Atl. 360; Cross v. Bean, 83 Me. 62, 21 Atl. 752; to the effect that the vendee's estate prevails against a purchaser from the vendor with notice.

(e) The text is cited in Coleman v. Dunton, (Me.), 58 Atl. 430.

looks upon the money which has taken the place of the land; that is, so far as the land is a representative of the vendor's property, so far as it is an element in his total assets, equity treats it as money, as though the exchange had actually been made, and the vendor had received the money and transferred the land. Although the legal title to the land would still descend to the vendor's heirs upon his death, still when the vendee afterwards completes the contract, takes a conveyance of the legal title *from the heirs,* and pays the price, the money, being all the time an element of the vendor's assets, and being, therefore, all the time a part of his personal and not of his real property, goes to his administrators or executors, to be by them administered upon with the rest of his personal assets, and does not go to the heirs.[2]

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[2] The following are a few out of the very many authorities by which all the foregoing propositions of the text are fully sustained: Farrar v. Winterton, 5 Beav. 1, 8, per Lord Langdale, M. R. A testatrix made a will devising certain real estate. After making the will she entered into a contract to sell the same land. The contract was not fully carried into effect by conveyance and payment of the price until after her death, and the only question presented by the case was, whether the purchase-money thus paid belonged to the executors as part of the general assets of her estate, or whether it belonged to the devisees. Lord Langdale said (p. 8): "The question whether the devisees can have any interest in that part of the purchase-money which was unpaid depends on the rights and interests of the testatrix at the time of her death. She had contracted to sell her beneficial interest. In equity, she had *alienated the land,* and instead of her beneficial interest in the land, she had acquired a title to the purchase-money. What was really hers in right and equity was not the land, but the money, of which alone she had the right to dispose; and though she had a lien upon the land, and might have refused to convey until the money was paid, *yet that lien was a mere security, in or to which she had no right or interest except for the purpose of enabling her to obtain the payment of the money.* The beneficial interest in the land which she had devised was not at her disposition, but was by her act wholly vested in another at the time of her death." This opinion is a very clear and accurate statement of the doctrine, and the passage which I have italicized shows how erroneous is the notion, advanced by way of *dictum* or as ground of decision in a few American cases, that the equitable estate of the vendee only arises when and as far as he makes actual payment of the purchase price: Haughwout v. Murphy, 22 N. J. Eq. 531. "In equity, upon an agreement for the sale of lands, the contract is regarded for most purposes as if specifically executed. The purchaser becomes the equitable owner of the lands, and the vendor of the purchase-money. After the contract,

§ 369. Sources of All Equitable Property.— In the foregoing description is shown how, in one particular manner, by the operation of the fundamental principle, the equitable estate in land, the beneficial property, the real ownership,

the vendor is the trustee of the legal estate for the vendee: Crawford v. Bertholf, 1 N. J. Eq. 460; Hoagland v. Latourette, 2 N. J. Eq. 254; Huffman v. Hummer, 17 N. J. Eq. 264; King v. Ruckman, 21 N. J. Eq. 599. Before the contract is executed by conveyance, the lands are devisable by the vendee, and descendible to his heirs as real estate; and the personal representatives of the vendor are entitled to the purchase-money: Story's Eq. Jur., §§ 789, 790, 1212, 1213. If the vendor should again sell the estate, of which, by the first contract, he is only seised in trust, he will be considered as selling it for the benefit of the person for whom, by the first contract, he became a trustee, and therefore liable to account; or the second purchaser, if he had notice at the time of his purchase of the previous contract, will be compelled to convey the property to the first purchaser: Hoagland v. Latourette, 2 N. J. Eq. 254; Downing v. Risley, 15 N. J. Eq. 94. A purchaser from a trustee, with notice of the trust, stands in the place of his vendor, and is as much a trustee as he was: 1 Eq. Cas. Abr. 384; Story v. Lord Windsor, 2 Atk. 631. The *cestui que trust* may follow the trust property in the hands of the purchaser, or may resort to the purchase-money as a substitute fund: Murray v. Ballou, 1 Johns. Ch. 566, 581. It is upon the principle *of the transmission by the contract of an actual equitable estate*, and the impressing of a trust upon the legal estate for the benefit of the vendee, that the doctrine of the specific performance of contracts for the sale and conveyance of land mainly depends." See also Fletcher v. Ashburner, 1 Brown Ch. 497, 1 Lead. Cas. Eq., 4th Am. ed., 1118, 1123, 1157; Yates v. Compton, 2 P. Wms. 308; Green v. Smith, 1 Atk. 572, 573; Trelawny v. Booth, 2 Atk. 307; Pollexfen v. Moore, 3 Atk. 273; Mackreth v. Symmons, 15 Ves. 329, 336; Rose v. Cunynghame, 11 Ves. 554; Kirkman v. Miles, 13 Ves. 338; Peters v. Beverly, 10 Pet. 532, 533; Taylor v. Benham, 5 How. 234; Champion v. Brown, 6 Johns. Ch. 403, 10 Am. Dec. 343; Wood v. Cone, 7 Paige, 472; Wood v. Keyes, 8 Paige, 365; Worrall v. Munn, 38 N. Y. 139; Thompson v. Smith, 63 N. Y. 301, 303; Seaman v. Van Rensselaer, 10 Barb. 86; Kerr v. Day, 14 Pa. St. 112, 53 Am. Dec. 526; Robb v. Mann, 1 Jones, 300, 51 Am. Dec. 551; Richter v. Selin, 8 Serg. & R. 425, 440; Brewer v. Herbert, 30 Md. 301, 96 Am. Dec. 582; Lindsay v. Pleasants, 4 Ired. Eq. 321; Phillips v. Sylvester, L. R. 8 Ch. 173, 176, per Lord Selborne.[f]

(f) That the interest of the vendor in the purchase-money passes to his personal representative, who is the proper plaintiff in a suit for specific performance, see Solt v. Anderson (Nebr.), 93 N. W. 205; Bender v. Luckenback, 162 Pa. St. 18, 29 Atl. 295, 296; Williams v. Haddock, 145 N. Y. 144, 39 N. E. 825. In Clapp v. Tower, 11 N. Dak. 556, 93 N. W. 862, it was held that when the executors have canceled the contract of sale for default of the purchaser, and thus regained title, they may sell and convey the land and account to the court of their appointment for the proceeds as personalty, and the title so conveyed is good as against the arises, although no one of the acts or events has taken place which the common law so imperatively demands as a prerequisite to the existence of ownership or property. This instance is given simply as an example. An analysis of all the different equitable estates, property, and interests analogous to property, either real or personal, known to the equity jurisprudence will disclose the fact that nearly all, if not absolutely all, arise in the same general manner, by the operation upon the particular circumstances of the same fundamental principle, and with the same general results.[a] Thus an assignment or conveyance of that peculiar interest in land called a "possibility" is at the common law a mere nullity, so far at least as it attempted to create or transfer any ownership. At the time when the instrument is executed there is no present, certain, vested property right in the assignor upon which its granting language can attach; and if at some future time the contingency happens, the

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heirs of the vendor claiming title by succession. The equitable rights of the next of kin of the vendor are not defeated where the vendee, by his laches, after the death of the vendor, loses his right to specific performance, provided the contract was enforceable in equity at the death of the vendor; Keep v. Miller, 42 N. J. Eq. 100, 6 Atl. 495.

The equitable estate of the vendee will pass by his deed purporting to convey the land. Wilson v. Fairchild, 45 Minn. 203, 47 N. W. 642.

Since the vendee is a trustee of the purchase-money, the statute of limitations does not run against an action to enforce the vendor's lien until the trust relationship is terminated. Williams v. Young (Ark.), 71 S. W. 669.

The assertion by a tenant of the right to have a contract of purchase specifically enforced against his landlord, depending as it does upon the existence of the vendee's equitable estate, involves a denial of the landlord's title, within the meaning of the rule by which the tenant is estopped to deny such title. Davis v. Williams, 130 Ala. 530, 30 South. 488, 89 Am. St. Rep. 55, 54 L. R. A. 749.

That the purchaser is entitled to a homestead in the land, subject to the vendor's lien for the unpaid purchase-money, see Dortch v. Benton, 98 N. C. 190, 2 Am. St. Rep. 331, 3 S. E. 638.

See, in general, on the subject of this paragraph, Marvin v. Stimpson, 23 Colo. 174, 46 Pac. 673, quoting the text; Whittier v. Stege, 61 Cal. 238. For further treatment of the subject, and special rules arising from the relationship of vendor and vendee in equity, see *post*, §§ 1161, 1163, 1260, 1261; Pom. Eq. Rem., chapter on Specific Performances.

(a) The text is cited in Sourwine v. Supreme Lodge, 12 Ind. App. 447, 54 Am. St. Rep. 532, 40 N. E. 646.

possibility changes into a certainty, and a property right becomes vested in the assignor, the arbitrary and technical rules of the common law concerning conveyances of real estate did not allow the words of assignment to act upon this newly arisen and vested interest so as to transfer it to the assignee. The effect of such a transaction in equity is wholly different. Although when the assignment is executed there is no present certain right of property in the assignor which can be transferred, yet in the view of equity the instrument operates at least as an executory agreement on the part of the assignor, and creates a *present* obligation resting upon him with reference to the land, which obligation, though *now* contingent, may in future become absolute. If, therefore, at a subsequent time the contingency happens, and a certain present property thereupon vests in the assignor, the obligation, now become absolute, at once attaches to it. By virtue of that obligation this property or estate of the assignor *ought* to be conveyed to the assignee by an efficient legal assurance; and equity, regarding what ought to be done as done, treats the property as transferred, and the assignee as vested with the complete beneficial ownership. In this manner equity, in pursuance of the fundamental principle under discussion, gives full effect to an assignment or conveyance of a " possibility," and makes it the source of an equitable property in land. Again, a sale of a chattel not yet in existence, or not yet in the possession of the vendor, but to be acquired in future, passes no property in the thing to the buyer at law, even when it subsequently comes into the seller's ownership and possession. Such contract gives to the buyer a right of action for damges, but no property; he can maintain an action of assumpsit, but not replevin, or trover, or trespass.[1] But as such a contract, although using language *in præsenti,* is, in effect, an executory agreement, and creates a definite obligation upon the vendor, equity, upon the same principle and in the same manner as last above explained, regards it as an assignment; and when the thing comes into existence, or into the ownership of the seller, the real, beneficial property in it is at once transferred to and vested in the buyer, and he is the equitable owner. It is in consequence of the same principle that an assignment of a thing in action, completely nugatory at the common law as a transfer, and indeed opposed to the ancient theories of the law, is regarded in equity as clothing the assignee with all the rights of his assignor. These illustrations have all been taken from express contracts. The principle also extends to cases where the legal relations arise from conveyances *inter vivos,* or will, in which one of the parties is a volunteer, and even to transactions in which the legal relations arise from no such definite cause, but are merely implied from the prior conduct of the parties. In all express active trusts to convey the *corpus* of the trust property directly to the *cestui que trust,* and in all express *passive* trusts to hold the land for the use of the *cestui que trust,* created either by deed or by will, an equity exists between the beneficiary and the trustee, an obligation rests upon the latter, and this equity is treated as worked out, the obligation as performed, and the beneficiary as clothed with an equitable estate, depending in kind, quality, and degree upon the special provisions of the instrument. Finally, in trusts arising by operation of law, implied, constructive, and resulting trusts, the equity subsisting between the *cestui que trust* and the holder of the legal title, and the obligation resting upon the latter, are treated as though worked out, by regarding the beneficiary as vested with an equitable but no less real ownership.

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[1] I am stating, of course, the general rule, and need not describe the special excepted case of things having a "potential existence," such as an expected crop, etc.

§ 370. **The Equitable Estates Derived from This Principle.** — Having thus examined the meaning of the grand principle,— equity regards that as done which ought to be done,— and explained the *rationale* of its operation upon equity jurisprudence in giving rise to various kinds of equitable property and rights analogous to property, I shall finish the discussion by very briefly enumerating the most important of these equitable estates, interests, and property rights which are the immediate effects of the principle. As has already been shown, the maxim applies whenever an equity exists between two determinate parties with reference to some subject-matter; that is, an obligation rests upon one, and a corresponding right is held by another.[a] Such a right and duty may arise from a contract between the parties, and by the doctrines of equity a contract must be made upon an actual valuable consideration, in order that any *equitable* right and obligation may be created by it;[1] or from the dispositions contained in a deed or will, where the party clothed with the right is a volunteer; or from the conduct and relations of the parties, where the equity neither grows out of any express contract, conveyance, or will, as in trusts arising solely by operation of law. The various estates and interests resulting from the maxim might therefore be arranged in classes according to this threefold division; but it will be much more convenient to state them under their accepted names and titles as separate species of equitable property.

§ 371. **Conversion.**— One of the most direct and evident results of the principle is the equitable property which arises from the doctrine of conversion, — when real estate is treated by equity as personal property, or personal estate as real property; land as money, or money as land, — "nothing is better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this in whatever manner the direction is given, whether by will, by way of contract, marriage articles, settlement, or otherwise, or whether the money is actually deposited, or only covenanted to be paid; whether the land is actually conveyed, or only agreed to be conveyed; the owner of the fund or the contracting parties may make land money or money land."[1] A conversion may thus take place where, by a will, a deed, or family settlement, land is actually devised or conveyed, or money or securities are actually assigned to trustees, with directions in the one case to sell the land, and pay over the proceeds to the beneficiary, and in the other to invest the fund in the purchase of the land to be then conveyed to him; or it may in like manner take place where, by marriage articles or other executory agreement, land is covenanted to be conveyed, or money is covenented to be assigned, in like manner and for like purposes. The effect of the conversion is a direct consequence of the principle in question. Personal estate becomes, to all intents and purposes, in the view of equity, real, and real estate personal. Money directed to be invested in land descends to the heir of the original beneficiary, or passes under a general description of real property in his will, while land directed to be converted into money goes to his personal representatives, or is included in a residuary bequest of his "personal property." These are some of the incidents of a conversion, and are sufficient at present to illustrate its nature and results.[2]

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[1] A seal alone is not enough to show a consideration in equity: Jefferys v. Jefferys, Craig & P. 138; Hervey v. Audland, 14 Sim. 531; Meek v. Kettlewell, 1 Phill. Ch. 342, 1 Hare, 464; Ord v. Johnston, 1 Jur., N. S., 1063; Wycherley v. Wycherley, 2 Eden, 177; Estate of Webb, 49 Cal. 541, 545; Minturn v. Seymour, 4 Johns. Ch. 497; Burling v. King, 66 Barb. 633; Shepherd v. Shepherd, 1 Md. Ch. 244; Vasser v. Vasser, 23 Miss. 378; Kekewich v. Manning, 1 De Gex, M. & G. 176; Jones v. Lock, L. R. 1 Ch. 25; Wason v. Colburn, 99 Mass. 342; Pomeroy on Specific Performance, § 57, notes 2, 3.

(a) The text is cited in Sourwine v. Supreme Lodge, 12 Ind. App. 447, 54 Am. St. Rep. 532, 40 N. E. 646.

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[1] Per Sir Thomas Sewell, M. R., in Fletcher v. Ashburner, 1 Brown Ch. 497, 1 Lead. Cas. Eq., 4th Am. ed., 1118, 1120.

[2] Fletcher v. Ashburner, 1 Brown Ch. 497, 1 Lead. Cas. Eq., 4th Am. ed., 1118, 1123, 1157; Kettleby v. Atwood, 1 Vern. 298; Crabtree v. Bramble, 3 Atk. 680; Babington v. Greenwood, 1 P. Wms. 532; Lechmere v. Earl of Carlisle, 3 P. Wms. 211; Guidot v. Guidot, 3 Atk. 254; Sweetapple v. Bindon, 2 Vern. 536; Wheldale v. Partridge, 5 Ves. 396, 8 Ves. 227; Stead v. Newdigate, 2 Mer. 521; Elliott v. Fisher, 12 Sim. 505; Harcourt v.

§ 372. **Contracts for the Purchase and Sale of Lands.**— Another immediate and evident consequence of the principle is the equitable property created by mere agreements to purchase and sell lands. If the contract is made upon an actual valuable consideration, and complies in other respects with the requisites prescribed by equity, then, as soon as it is executed and delivered, the vendee acquires an equitable estate in the land subject simply to a lien in favor of the seller as security for payment of the price,[a] while the vendor becomes equitable owner of the purchase-money. There is in this case, as in the last, an equitable conversion; the vendee's interest is at once converted into real property with all its features and incidents, while the vendor's interest is, to the same extent, personal estate.[1]

§ 373. **Assignments of Possibilities; Sales of Chattels to be Acquired in the Future; Assignments of Things in Action; Equitable Assignments of Moneys; and Equitable Liens.**— The operation of the grand principle that equity regards that

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Seymour, 2 Sim., N. S., 45; In re Pedder, 5 De Gex, M. & G. 890; Ashby v. Palmer, 1 Mer. 296; Craig v. Leslie, 3 Wheat. 563, 577, and cases cited; Dunscomb v. Dunscomb, 1 Johns. Ch. 508, 7 Am. Dec. 504; Lorillard v. Coster, 5 Paige, 173, 218; Gott v. Cook, 7 Paige, 523, 534; Kane v. Gott, 24 Wend. 641, 660, 35 Am. Dec. 641; Allison v. Wilson's Ex'r, 13 Serg. & R. 330, 332; Morrow v. Brenizir, 2 Rawle, 185, 189; Hurtt v. Fisher, 1 Har. & G. 88, 96; Leadenham v. Nicholson, 1 Har. & G. 267, 277; Siter v. McClanachan, 2 Gratt. 280; Pratt v. Taliaferro, 3 Leigh, 419, 421; Tazewell v. Smith's Adm'rs, 1 Rand. 313, 320, 10 Am. Dec. 533; Commonwealth v. Martin's Ex'r, 5 Munf. 117, 121; Smith v. McCrary, 3 Ired. Eq. 204, 207; Peter v. Beverly, 10 Pet. 534, 563; Taylor v. Benham, 5 How. 234, 269.

[1] Fletcher v. Ashburner, 1 Lead. Cas. Eq., 4th Am. ed., 1118, 1123, 1157, in notes; Burgess v. Wheate, 1 W. Black. 123, 129, 1 Eden, 177; Harford v. Purrier, 1 Madd. 532; Paine v. Meller, 6 Ves. 349; Rawlins v. Burgis, 2 Ves. & B. 387; Revell v. Hussey, 2 Ball & B. 287; Hampson v. Edelen, 2 Har. & J. 66, 3 Am. Dec. 530; Siter's Appeal, 26 Pa. St. 180; Jackson v. Small, 34 Ind. 241; Lewis v. Smith, 9 N. Y. 502, 510, 61 Am. Dec. 706; Moyer v. Hinman, 13 N. Y. 180; Thomson v. Smith, 63 N. Y. 301, 303; Moore v. Burrows, 34 Barb. 173; Adams v. Green, 34 Barb. 176; Schroppel v. Hopper, 40 Barb. 425; and see *ante*, § 368, note.

[a] The text is cited, as to the vendor's lien, in Peay v. Seigler, 48 S. C. 496, 59 Am. St. Rep. 731, 26 S. E. 885; Schenck v. Wicks, 23 Utah, 576, 65 Pac. 732.

as done which in good conscience ought to be done is perhaps less immediate and evident in producing these species of equitable property, or interest, but is no less real and certain. In all these instances an equity exists between the two parties, growing either out of an assignment which at law creates or transfers no *property* right, either present or future, in the subject-matter, or out of an executory contract which at law only creates a personal demand, — a mere right of action, — and equity, laying hold of the obligation thus assumed by or imposed upon one of the parties, transforms it, so to speak, upon the happening of the contingent event contemplated, into the real, beneficial, equitable ownership, property, or interest, of whatever nature and extent, absolute or qualified, it may be, according to the terms of the instrument. Thus the assignee of a possibility becomes equitable owner of the estate when the event takes place; the vendee of chattels to be acquired becomes their equitable owner; the equitable assignee of a fund becomes the real owner of the money; and from a mortgage or other transfer inoperative as such at law, or from the mere executory stipulations of an agreement, complete equitable liens upon specific lands, chattels, or funds are created.[1] [a]

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[1] For authorities illustrating each of these species, see *ante*, § 369, and notes thereunder. In describing equitable liens, Currey, C. J., in Daggett v. Rankin, 31 Cal. 321, 326, used the following language: "The doctrine seems to be well established that an agreement in writing to give a mortgage, or a mortgage defectively executed, or an imperfect attempt to create a mortgage, or to appropriate specific property to the discharge of a particular debt, will create a mortgage in equity, or a specific [equitable] lien on the property intended to be mortgaged. The maxim of equity upon which this doctrine rests is, that equity looks upon things agreed to be done as actually performed; the true meaning of which is, that equity will treat the subject-matter, as to collateral consequences and incidents, in the same

(a) As to equitable liens, see *post*, § 1235; Howard v. Delgado County, 121 Fed. 26; Lynch v. Moser, 72 Conn. 714, 46 Atl. 153 (agreement to give a mortgage); Shipman v. Lord, 58 N. J. Eq. 380, 44 Atl. 215, 46 Atl. 1101; National Bank of Deposit v. Rogers, 166 N. Y. 380, 59 N. E. 922. As to equitable assignment of a fund, see *post*, §§ 1280–1284; Preston v. Russell, 71 Vt. 151, 44 Atl. 115.

§ 374. **Express Trusts.**[a]— In every particular instance of that vast section of peculiar ownerships to which the generic name of " Trusts " is given, where the legal title to the subject-matter is vested in one person, and the equitable title is held by another, this equitable property is the direct and plain effect of the principle which we are discussing. The truth of this statement is undeniable in all those cases of express trusts which thus divide the total ownership into the legal estate of the trustee, and the equitable estate of the *cestui que trust.* In express passive trusts, a naked legal title remains in the trustee, but the equitable and real property, with all its features and incidents, belongs to the beneficiary, so that he is treated in every sense as the true owner. Where land is given to a trustee merely upon the trust to convey the same to a specified beneficiary, the principle applies with equal force, and the *cestui que trust* is clothed with the equitable property, although the directions of the trust have not yet been carried into effect by an actual transfer to him of the legal estate. In another class of express active trusts, where by the terms of the creation the possession of the subject-matter, and the control, management, and disposition of it during the time for which the trust is to last, are given to the trustee, to be exercised by him according to his own discretion, no such equitable property passes to the *cestui que trust,* and his right for the time being is only a thing in action, not an estate; no obligation rests upon the trustee as a part of his fiduciary duty to make a transfer of the title to the beneficiary; the " ought " required by the maxim is not present, and the principle itself does not apply as long, at least, as the trust remains alive.[1]

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manner as if the final acts, contemplated by the parties, had been executed exactly as they ought to have been."

[1] For illustration, see *ante,* § 153, and notes. It should be remembered that, according to the legislation of several states, in the only express trusts of land which are permitted by the statutes, it is enacted that all estate

(a) Sections 374–376 are cited in Savings & Loan Soc. v. Davidson, 97 Fed. 696, 38 C. C. A. 365.

§ 375. **Trusts Arising by Operation of Law.**—The principle is no less truly and directly the source of the equitable ownership regarded as held by the beneficiary in all trusts which arise by operation of law, resulting, implied, or constructive. Although the fiduciary relation is not created by the terms of any direct conveyance, devise, assignment, or agreement, yet by the settled doctrines of the equity jurisprudence, an equity exists between the parties which is treated as worked out; an obligation to convey the subject-matter rests upon the holder of the legal title, which is treated as though performed. Some modern judges of great learning and ability have said that the relations commonly known as " constructive " or " resulting " trusts are only trusts *sub modo,* are called trusts only by way of analogy, and for want of a better and more distinctive name. Even if this criticism upon the ordinary nomenclature be well founded, it does not deny, and was not intended to deny, the existence of the real, beneficial, equitable property in the beneficiary. He is admitted to be the equitable owner, with all the incidents of ownership, although the legal title is vested in another person. The beneficiary may not have anything which the law requires as a " title," he may even be without any written evidence of his right, his proprietorship may rest wholly upon acts and words, but still he is the equitable owner because equity treats that as done which in good conscience ought to be done.[1]

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and title, legal and equitable, shall be vested in the trustee, and that the *cestui que trust* shall have no estate, but only a right of action to compel a faithful performance by the trustee.

[1] See illustrations, *ante,* § 155, and notes. The opinion of the lord chancellor, Lord St. Leonards, will apply to all such cases. A man had conveyed his land in fee by a deed which was fraudulent as against himself, so that he could have procured the deed to be set aside in equity; still the legal estate was wholly conveyed to the grantee. Afterwards the grantor devised the same land, and the question was, What interest did he have in the land, and was it devisable? See Stump v. Gaby, 2 De Gex, M. & G. 623, 630. Lord St. Leonards said: " What, then, is the interest of a party in an estate which he has conveyed under circumstances which would give a right in this court to have the deed set aside? In the view of this court

§ 376. **Mortgage; Equity of Redemption.**— There remains but one important equitable estate to be considered, that of the mortgagor, called his equity of redemption; and a careful analysis will show that the existence of this as a part of equity jurisprudence can be accounted for upon no principle whatever other than the one under discussion. By a mortgage in fee the legal estate is vested in the mortgagee, and upon the condition being broken, this legal estate becomes absolute. Nevertheless an equity with respect to the land exists between the two parties, a right in the mortgagor and an obligation upon the mortgagee. "Equity of redemption" is only an abbreviation of "right in equity to have a redemption." The mortgagor is clothed with this equitable right to a redemption, or in other words, this right to compel a reconveyance and redelivery of possession at any time upon payment of the debt secured and interest, while the corresponding obligation rests on the mortgagee to make the conveyance and delivery. Upon the universal principle of treating everything as done which in good conscience ought to be done, equity regards this right of the mortgagor, not as a mere thing in action, but as property, as an estate, as the real, beneficial ownership of the land, subject, however, to the lien created by the mortgage as a security to the mortgagee for the payment of his demand. The mortgagor's equitable property is, in this respect, exactly analogous to the equitable estate of a

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he remains the owner, and the consequence is, that he may devise the estate, not as a legal estate, but as an equitable estate. The testator therefore had a devisable interest." Now, where, as in this case, the legal title had vested in the grantee, upon what principle was the grantor still regarded as the equitable owner, with all the incidents of the beneficial ownership? Plainly because from the fraud an equity with respect to the land existed between the grantee and the grantor, and an obligation rested upon the former to reconvey. Since the grantee in good conscience ought to reconvey, equity treated the parties as though this had been done, and the grantor as holding the equitable property. Upon the same principle is based the notion of equitable property in the beneficiary in all constructive and other implied trusts. See also Gresley v. Mousley, 4 De Gex & J. 78; Uppington v. Bullen, 2 Dru. & War. 184.

vendee subject to a lien in favor of the vendor as security for payment of the purchase price.[1]

§ 377. **Conclusions.**— In the foregoing discussion I have shown, in the most conclusive manner, that every species of purely equitable property, and of equitable interests analogous to property, except those which are intentionally created by the direct and affirmative operation of some instrument similar in its action to a conveyance at law,[1] is a certain and necessary result of the principle, that equity treats that as done which in good conscience ought to be done. It is no exaggeration, therefore, to say that the principle lies at the very foundation of the department of equity jurisprudence which deals with equitable estates, property, and interests analogous to property.

SECTION II.

EQUITY LOOKS TO THE INTENT RATHER THAN TO THE FORM.

ANALYSIS.

§ 378. Its meaning and effect.
§ 379. Legal requirements of mere form.
§§ 380–384. Is the source of equitable doctrines.
  § 380. Of equitable property.
  § 381. Of penalties and forfeitures.
  § 382. Of mortgages.
  § 383. Effect of the seal.
  § 384. Other special instances.

§ 378. **Its Meaning and Effect.**— The principle involved in this maxim, which is one of great practical importance, pervades and affects to a greater or less degree the entire system of equity jurisprudence, and is inseparably connected with that which forms the subject of the preceding section. In fact, *it is only by looking at the intent rather*

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§ 376, [1] For authorities and illustrations, see *ante*, §§ 162, 163, and notes.

§ 377, [1] The lien held by the mortgagee, created by the affirmative operation of the mortgage, and some other equitable liens, are examples of this class.

than at the form, that equity is able to treat that as done which in good conscience ought to be done. In explaining the meaning and operation of the one maxim, and the effects produced by it, I have necessarily described the significance and workings of the other. The two principles act together and aid each other, and it is by their universality and truth that much of equity jurisprudence which is peculiar and distinctive, in contrast with the law, has been developed. Equity always attempts to get at the substance of things, and to ascertain, uphold, and enforce rights and duties which spring from the *real* relations of parties. It will never suffer the mere appearance and external form to conceal the true purposes, objects, and consequences of a transaction.[a] This principle of looking after the intent and giving it effect was fully recognized and distinctly formulated at an early day. In one leading case Lord Chancellor Macclesfield said: "The true ground of relief against penalties *is from the original intent of the case,* where the penalty is designed only to secure money, and the court gives the party all that he expects or desired."[1] In another case Lord Thurlow said: "The rule is, that where a penalty is inserted merely to secure the enjoyment of a collateral object, the enjoyment of that object is considered as the principal intent of the deed, and the penalty only as occasional."[2] It is true that in both of these cases the court was dealing with penalties; but the principle stated in them is of universal application, that equity always seeks for the real intent under the cover of whatever forms and appearances, and will give effect to such intent unless prevented by some positive and mandatory rule of the law.

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[1] Peachy v. Duke of Somerset, 1 Strange, 447, Prec. Ch. 568, 2 Eq. Cas. Abr. 227, 228.

[2] Sloman v. Walter, 1 Brown Ch. 418. And see 2 Lead. Cas. Eq., 4th Am. ed., 2014, 2022, and notes.

(a) The text is quoted in Heinze v. Butte & B. Consol. Min. Co., (C. C. A.), 129 Fed. 274, 287.

§ 379. Legal Requirements of Form.— The ancient common law paid great deference to matters of pure form, as, for example, in the symbolical process called "livery of seisin," by which alone a freehold estate in land could be transferred. Although such observances have long been abandoned, still the present rules of the law permit property in land or chattels to be created, transferred, or acquired only in certain defined modes, by means of the certain specified acts or events which constitute all the possible legal titles.[1] It was also one characteristic feature of the ancient law that it held contracting parties to a most rigid observance of all the stipulations of their valid agreements; performance to the very letter of every covenant or promise was the inflexible rule.[2] Still another purely formal element of the law consisted in the extreme importance which it attached to the seal. The momentous and often most arbitrary results which flowed from the presence or absence of a seal, and its effect upon private rights of property and of contract, rendered many of the rules of the early law peculiarly rigid and almost barbarous. The equity jurisprudence, in all these respects, differed widely from the common law; from the very beginning it was distinguished by an entire absence of these arbitrary and purely formal incidents. That they have now, in a great degree, disappeared from the law itself, which has in consequence become more enlightened and more just, is wholly due to its gradual adoption of equitable principles, to its acceptance of doctrines originating in the court of chancery.[a]

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[1] See an enumeration of these modes, *ante*, § 366.

[2] For example, if A borrowed one hundred pounds to be repaid in six months, and as security gave his creditor a conditional conveyance in fee of an estate worth one hundred thousand pounds, to become void if the money was paid on the specified day, and in default of such payment to be absolute, and for any reason the debtor suffered the pay day to pass without performance, the ancient law would no more relieve the debtor from the onerous provisions of his conveyance, or modify their rigor, than it would discharge him from his obligation to pay the debt of one hundred pounds; both would be regarded as standing upon exactly the same foundation of express contract.

§ 380. **Is the Source of Equitable Doctrines — Of Property.** I shall now state, by way of illustration, some of the most important instances in which the principle has been applied, and the settled doctrines of equity jurisprudence which are its immediate results. The first, and by far the most important consequence of the principle, reaching through a large part of the equity jurisprudence, is found in every species of equitable property, estate, or interest, and of equitable lien, so far as these exist by the doctrines of equity, but not by those of the law. While, as is shown in the last section, all these purely equitable property interests and liens arise from the direct operation of the grand principle, equity treats that as done which in good conscience ought to be done, still this maxim could only produce such effects in consequence of the other principle, that equity looks at the intent rather than at the form.[a] In every kind of equitable property, or interest analogous to property, the external acts or events peremptorily required by the law in order to the existence of any property are wholly wanting; so that if the external form of the transaction had been regarded, no property, nor right resembling property, could possibly exist. It is by disregarding these forms and looking at the real relations involved in the acts of the parties, at the real substance and intent of the transaction, that the court of chancery has built up its magnificent structure of equitable property, estates, and proprietary interests. The same is true of a large part of equitable liens. The external form is either an assignment, which at the law is wholly nugatory, or an executory agreement, which at law only creates a mere personal right of action,— at most a claim for damages; but equity, going below this mere appearance, and seeing the real intent, gives effect thereto by treating the assignment or agreement as creating a definite lien upon specific lands, or chattels, or securities, or other kind of fund, as the case may be.[1] [b] The discussions of the last preceding section fully illustrate and demonstrate the correctness of this conclusion.

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§ 379, (a) This paragraph of the text is cited in Williams v. Uncompahgre Canal Co., 13 Colo. 477, 22 Pac. 806; Hooper v. Central Trust Co., 81 Md. 559, 32 Atl. 505, 29 L. R. A. 262.

§ 380, (a) The text is cited in Clarke v. Clarke, 46 S. C. 230, 57 Am.

§ 381. **Penalties and Forfeitures.**— It was an inflexible doctrine of the ancient common law that parties must be held to a strict performance of all the stipulations of their valid agreements; that is, unless the agreement was wholly void from its illegality. Whenever, therefore, a contract provided for a penalty or a forfeiture, the full penalty or forfeiture would be enforced by a court of law without the slightest regard to the amount of damages actually sustained by the obligee or promisee from the default. The action of equity in such cases affords a most striking illustration of the principle which we are discussing. It was at first confined to contracts for the payment of some definite sum of money, in which the debtor also bound himself, in case of his default, to pay a larger sum by way of penalty, or that the creditor might become absolute owner of specific property of a larger value by way of forfeiture, where the intent was plain that the penalty or forfeiture was added simply as a security for the payment of the real indebtedness. This action of equity with reference to purely money contracts was soon extended to other agreements in which a party undertook to perform some act, to render some service, to transfer some property, to surrender some right, and a penalty or forfeiture was added. The general doctrine was finally settled that, wherever a penalty or forfeiture is inserted merely to secure the payment of money, or the performance of some act, or the enjoyment of some right or benefit, equity regards such payment, performance, or enjoyment as the real and principal intent of the instrument, and the penalty or forfeiture as merely an accessory, and will therefore relieve the debtor party from such penalty or forfeiture, whenever the actual damages sustained by the creditor party can be adequately compensated. The application of the principle in such cases, and the relief against penalties or forfeitures, must always depend upon the question whether compensation can or cannot be made. If the principal contract is merely for the payment of money, there can be no difficulty; the debtor party will always be relieved from the penalty or foreiture upon paying the amount due and interest. If the principal contract is for the performance of some other act or undertaking, and its non-performance can be pecuniarily compensated, the amount of such damages will be ascertained, and the debtor will be relieved upon their payment.[1] But the principle, in this scope of its operation, is not confined to agreements; it has been extended so as to prevent the forfeiture of a tenant's estate under a clause of re-entry for the non-payment of rent, or for the breach of some, though not of all, the covenants contained in a lease;[2] and to prevent the enforcement of a forfeiture for the non-performance of conditions subsequent.[3] As equity will often interfere in this manner to relieve against a penalty or forfeiture which perhaps would be entirely valid at law, it follows as a matter of course that a court of equity will never, by its affirmative action, or by the affirmative provisions of its decree, enforce a penalty or forfeiture, or any stipulation of that nature, but will always leave the party entitled to prosecute his claim in a court of law according to legal rules.[4]

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[1] As a single illustration: An instrument purporting to be a mortgage of law, but imperfectly executed by the omission of a seal, or in some other manner, so as to be defective in form, is wholly nugatory at law as a valid mortgage, or as giving any interest in or claim upon the parcel of land described. Equity, however, not saying that the instrument is a true legal mortgage, declares that it is an efficient agreement to give a mortgage, and, as such, that it creates an equitable lien upon the land, valid for all purposes, and as against all parties, except a purchaser of the land for a valuable consideration and without notice: See Love v. Sierra Nevada, etc., Co., 32 Cal. 639, 653, 654, 91 Am. Dec. 602, and cases cited.

St. Rep. 675 (as to the doctrine of conversion).

(b) A deed defective in form will generally be treated in equity as a contract to convey, specific performance of which will be decreed when that remedy is not inequitable. See Munds v. Cassidy, 98 N. C. 558, 4 S. E. 355 (lack of seal); Sparks v. Woodstock Iron, etc., Co., 87 Ala. 294, 6 South. 195 (defective attestation); Dreutzer v. Lawrence, 58 Wis. 594, 17 N. W. 423 (same); Wood v. Rayburn, 18 Oreg. 3, 22 Pac. 521; Hyne v. Osborn, 62 Mich. 235, 28 N. W. 821. As to the equitable lien created by defective mortgages, see § 1237.

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[1] Peachy v. Duke of Somerset, 1 Strange, 477; Sloman v. Walter, 1 Brown Ch. 418, 2 Lead. Cas. Eq., 4th Am. ed., 2014, 2023, 2044; Elliott v. Turner, 13 Sim. 477; Rogan v. Walker, 1 Wis. 527; Grigg v. Landis, 21 N. J. Eq. 494; Giles v. Austin, 38 N. Y. Sup. Ct. 215; Hagar v. Buck, 44 Vt. 285, 8 Am. Rep. 368.

§ 382. **Mortgages.**— Another most remarkable application of the principle, from which arose an entire department of equity jurisprudence, was the equity of redemption,— the equitable right and estate of the mortgagor, after the legal title of the mortgagee had become absolute by a non-performance of the condition. Looking at the real intent of the parties, and considering the debt as the substantial feature, and the conveyance as a security, only, for its payment, the court of chancery declared that a breach of the condition was in the nature of a penalty which ought to be relieved against, and that the mortgagee had an equity to redeem on payment of the debt and interest, notwithstanding the forfeiture at law; and furthermore, that this right of redemption could not be given up, waived, or parted with by any stipulation or covenant in the deed.[1] The whole system of equity jurisprudence presents no finer example of the triumph of equitable principles over the arbitrary and unjust dogmas of the common law than this.

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[2] The tenant will be relieved from a forfeiture incurred by his breach of a condition for a non-payment of rent, because the extent of the lessor's real claim, the amount of rent due, can easily be ascertained, and satisfied by a payment. The relief may be given on the breach of some other covenants, but is not generally extended to covenants to repair, to insure, etc. See 2 Lead. Cas. Eq., 4th Am. ed., 2014, 2023, 2044, and notes; Hill v. Barclay, 16 Ves. 402, 18 Ves. 56, 62; Reynolds v. Pitt, 19 Ves. 134; White v. Warner, 2 Mer. 459; Ex parte Vaughan, Turn. & R. 434; Green v. Bridges, 4 Sim. 96; Elliott v. Turner, 13 Sim. 477; Gregory v. Wilson, 9 Hare, 683; Croft v. Goldsmid, 24 Beav. 312; Palmer v. Ford, 70 Ill. 369.

[3] Smith v. Jewett, 40 N. H. 530; Warner v. Bennett, 31 Conn. 468; Robinson v. Loomis, 51 Pa. St. 78; Rogan v. Walker, 1 Wis. 527; Hagar v. Buck, 44 Vt. 285, 8 Am. Rep. 368; Orr v. Zimmerman, 63 Mo. 72.

[4] Livingston v. Tompkins, 4 Johns. Ch. 415, 431, 8 Am. Dec. 598; McKim v. Whitehall Co., 2 Md. Ch. 510; Shoup v. Cook, 1 Cart. 135; Warner v. Bennett, 31 Conn. 468, 478; Lefforge v. West, 2 Ind. 514, 516 (will not decree forfeiture of an estate on account of waste); Smith v. Jewett, 40 N. H. 530, 534; Clark v. Drake, 3 Chand. 253, 259; Eveleth v. Little, 16 Me. 374, 377; Gordon v. Lowell, 21 Me. 251, 257 (will not enforce a penalty created by statute); Fitzhugh v. Maxwell, 34 Mich. 138 (will not enforce a forfeiture for non-performance of a condition subsequent in a contract for the sale of land); Beecher v. Beecher, 43 Conn. 556 (same rule); Palmer v. Ford, 70 Ill. 369 (forfeiture for non-payment of rent); Orr v. Zimmerman, 63 Mo. 72.

§ 383. **Effect of the Seal.**— The important part played by the seal in the early common law, and the intensely technical and arbitrary effects produced by it according to the legal rules, are too well known to require any statement. Equity has applied its principle of looking at the intent rather than at the form, in some instances, by treating the presence of a seal as a matter of no consequence, as producing no effect upon rights and duties of parties; in other instances, by disregarding its absence where such absence would be fatal at the law. Although the common law, *in theory*, required a valuable consideration in order to render any agreement valid and binding, yet it declared that a seal was conclusive evidence of such a consideration, and under no circumstances would it permit this arbitrary effect to be removed by evidence showing, no matter how clearly, the absence of any consideration. Equity, disregarding such form and looking at the reality, always requires an actual consideration, and permits the want of it to be shown, notwithstanding the seal, and applies this doctrine to covenants, settlements, and executory agreements of every description.[1] [a]

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§ 382, [1] Casborne v. Scarfe, 1 Atk. 603; Howard v. Harris, 1 Vern. 190, 2 Lead. Cas. Eq., 4th Am. ed., 1945, 1949, 1952, 1983; see also *ante*, §§ 162, 163, and notes.

§ 383, [1] In Ord v. Johnston, 1 Jur., N. S., 1063, 1065, Stuart, V. C., said: "This court never interferes in support of a purely voluntary agreement, or where no consideration emanates from the individual seeking the performance

(a) Selby v. Case, 87 Md. 459, 39 Atl. 1041.

Another application of the principle is still more striking and just. The early common law attributed such an efficacy to the seal that a written obligation under seal could only be discharged by an instrument of the same high character, — that is, by a writing under seal. A subsequent written but not sealed agreement, revoking or modifying the terms of the prior specialty, or a parol accord, or even payment in full unaccompanied by technical release, or any other matter *in pais,* could not alter the rights and liabilities arising from the sealed instrument; it could still be enforced against the obligor by an action at law, and such acts furnished him no legal defense whatever. Such a doctrine was abhorrent to the spirit of equity. Paying no attention to the form of the transaction, if the act done was, in substance, a discharge, the court of equity treated it as equivalent in its effects to a technical release, and would relieve the obligor in any manner required by the circumstances of the case, even by a decree for a delivery up or cancellation of the sealed undertaking.[2] [b] One most im-

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of the agreement." In Houghton v. Lees, 1 Jur., N. S., 862, 863, the same judge said: "Of the general doctrine of the court on this subject, there is no doubt whatever. This court will not perform a voluntary agreement, or what is more, a voluntary covenant under seal. Want of consideration is a sufficient reason for refusing the assistance of the court." See also Jefferys v. Jefferys, Craig & P. 138, 141, per Lord Chancellor Cottenham, who says the doctrine extends to contracts, covenants, and settlements, and in other cases it is applied to voluntary *executory* trusts; the seal produces no effect whatever in such voluntary undertakings: Cochrane v. Willis, 34 Beav. 359; Meek v. Kettlewell, 1 Phila. 342, 1 Hare, 464; Hervey v. Audland, 14 Sim. 531; Shepherd v. Shepherd, 1 Md. Ch. 244; Vasser v. Vasser, 23 Miss. 378; Minturn v. Seymour, 4 Johns. Ch. 497; Burling v. King, 66 Barb. 633; Estate of Webb, 49 Cal. 541, 545; Stone v. Hackett, 12 Gray, 227. In a few early cases it was held that voluntary agreements, *if under seal,* should be enforced; but these decisions and *dicta* have long since been overruled; as, for example, see Beard v. Nutthall, 1 Vern. 427; Wiseman v. Roper, 1 Ch. Cas. Ch. 84; Tyrrell v. Hope, 2 Atk. 562; Edwards v. Countess of Warwick, 2 P. Wms. 176.

[2] Of course the discharge must be upon a valuable consideration in order that equity might enforce it: Cross v. Sprigg, 6 Hare, 552; Tufnell v. Constable, 8 Sim. 69; Yeomans v. Williams, L. R. 1 Eq. 184; Taylor v. Manners,

(b) McCreery v. Day, 119 N. Y. 1, 23 N. E. 198, 16 Am. St. Rep. 793, 6 L. R. A. 506.

portant consequence of this principle is seen in the legal and equitable liabilities of sureties. Where the surety's contract is under seal, he is not, by the strict common-law rules, discharged by any conduct of the creditor towards the principal debtor, by an alteration of the principal debtor's undertaking, or by an agreement with the principal debtor extending his time of payment, since the surety's liability could only be discharged by an instrument under seal.[3] Equity was therefore compelled to interfere under these circumstances, and relieve the surety by restraining the creditor from suing at law, and compelling him to surrender and cancel the guaranty.[4] There are other instances of the disregard shown by equity to the presence or absence of a seal in determining the rights of parties. If, for an example, an instrument, from its imperfect execution in wanting a seal, is inoperative at law as a conveyance or as a mortgage of land, equity may treat it as an agreement to convey or to give a mortgage, and as therefore creating an equitable interest in or lien upon the land.[c]

L. R. 1 Ch. 48; Hurlbut v. Phelps, 30 Conn. 42; Campbell's Estate, 7 Pa. St. 100, 47 Am. Dec. 503; Kidder v. Kidder, 33 Pa. St. 268. The early common law was so monstrous in its adherence to this rule, that if the debtor on a bond or other specialty had paid the demand in full, and had even taken a written receipt therefor, but had failed to procure a surrender up of the instrument or a release of his liability, the creditor might still sue at law and recover the full amount again, and the law gave no redress or defense. One of the first steps by which equity broke in upon the rigor of the law was the remedy which it gave to the obligor under these circumstances, as stated in the text. It is a fact that the common-law lawyers vehemently inveighed against the court of chancery for this alleged invasion of legal rules. The equitable doctrine long ago became a part of the law, but it should not be forgotten that it originated in the court of chancery.

[3] Archer v. Hale, 1 Moore & P. 285; Aldridge v. Harper, 3 Moore & S. 518; Brooks v. Stuart, 1 Beav. 512. In most of our states, if not indeed in all, this particular rule of the common law does not prevail.

[4] Rees v. Berrington, 2 Ves. 540, 2 Lead. Cas. Eq., 4th Am. ed., 1867, 1870, 1896.

(c) The text is cited to this point in Scott v. Jenkins (Fla.), 35 South. 101; Frost v. Wolf, 77 Tex. 455, 19 Am. St. Rep. 761, 14 S. W. 440; Allis v. Jones, 45 Fed. 148; and cited generally in Williams v. Uncompahgre Canal Co., 13 Colo. 477, 22 Pac. 806. See § 1237; as to imperfectly executed deeds, *ante*, § 380, note.

§ 384. **Other Special Instances.**—Other doctrines of equity, by which the strict terms of contracts, and the somewhat arbitrary rules of law relating thereto, are disregarded in order to promote the ends of justice, may also be referred, at least partly, to this principle of looking at the real intent rather than at the form. As a mere illustration, I mention the doctrine which generally treats as joint and several the rights and liabilities arising from contracts which are regarded by the law as strictly joint, and the many important consequences which flow from this difference. Enough has been said, however, to show that the principle is one of very extensive application, and from it, either alone or in connection with others, are derived large portions of equity jurisprudence.[a]

SECTION III.

HE WHO SEEKS EQUITY MUST DO EQUITY.

ANALYSIS.

§ 385. General meaning of the principle.
§§ 386, 387. In what cases applicable.
§ 388. Is a general rule regulating the administration of reliefs.
§§ 389–393. Illustrations of the principle.
§ 389. The wife's equity.
§ 390. Equitable estoppel.
§ 391. Relief against usury.
§§ 392, 393. Other special instances.
§§ 394–396. Is also the source of certain equitable doctrines.
§ 395. Of election.
§ 396. Of marshaling securities.

§ 385. **Its Meaning.**— This maxim expresses the governing principle that every action of a court of equity, in determining rights and awarding remedies, must be in accordance with conscience and good faith. In its broadest sense it

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(a) The text is cited in Williams v. Uncompahgre Canal Co., 13 Colo. 477, 22 Pac. 806.

may be regarded as the foundation of all equity, as the source of every doctrine and rule of equity jurisprudence; since it is undeniable that courts of equity do not recognize and protect the equitable rights of litigant parties, unless such rights are, in pursuance of the settled juridical notions of morality, based upon conscience and good faith. But as a practical principle, guiding the equity courts in their administration of justice, the maxim is only used in a much narrower and more special meaning. Even in this narrow signification it is a principle of most extensive application; it may be applied, in fact, in every kind of litigation and to every species of remedy. The meaning is, that whatever be the nature of the controversy between two definite parties, and whatever be the nature of the remedy demanded, the court will not confer its equitable relief upon the party seeking its interposition and aid, unless he has acknowledged and conceded, or will admit and provide for, all the equitable rights, claims, and demands justly belonging to the adversary party, and growing out of or necessarily involved in the subject-matter of the controversy.[a] It says, in effect, that the court will give the plaintiff the relief to which he is entitled, only upon condition that he has given, or consents to give, the defendant such corresponding rights as *he* also may be entitled to in respect of the subject-matter of the suit.[b] This meaning of the principle was more definitely expressed by an eminent judge in the following terms: "The court of equity refuses its aid to give to the plaintiff what the law would give him if the courts of common law had jurisdiction to enforce it, without imposing upon him conditions which the court considers he ought to comply with, although the subject

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(a) This portion of the text is quoted in Charleston & W. C. R'y Co. v. Hughes, 105 Ga. 1, 70 Am. St. Rep. 17, 30 S. E. 972; De Walsh v. Braman, 160 Ill. 415, 43 N. E. 597; Hooper v. Central Trust Co., 81 Md. 559, 32 Atl. 505, 29 L. R. A. 262; Compton v. Jesup, 68 Fed. 263, 316, 31 U. S. App. 486, 15 C. C. A. 397.

(b) This sentence is quoted in Charleston & W. C. R'y Co. v. Hughes, 105 Ga. 1, 70 Am. St. Rep. 17, 30 S. E. 972; Mack v. Hill, 28 Mont. 99, 72 Pac. 307; Compton v. Jesup, 68 of the condition should be one which the court would not otherwise enforce." In this narrow and particular sense the principle becomes a universal rule governing the courts of equity in administering all kinds of equitable relief, in any controversy where its application may be necessary to work out complete justice.[1] [c]

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[1] In the two following quotations this aspect of the principle is stated in the most accurate manner: Hanson v. Keating, 4 Hare, 1, 4, per Wigram, V. C.: "The argument in this case for the defendant was founded upon the well-established rule of this court, that a plaintiff who would have equity must do equity, a rule by which, properly understood, it is at all times satisfactory to me to be bound. But it is a rule which, as it was used in the argument of this case, takes for granted the whole question in dispute. The rule, as I have often had occasion to observe, cannot *per se* decide what terms the court should impose upon the plaintiff as the price of the decree it gives him. It decides in the abstract that the court, giving the plaintiff the relief to which he is entitled, will do so only upon the terms of his submitting to give the defendant such corresponding rights (if any) as he also may be entitled to in respect of the subject-matter of the suit. What those rights are must be determined *aliunde* by strict rules of law [meaning, of course, rules of equity, not of common law], and not by any arbitrary determination of the court. The rule, in short, merely raises the question what those terms, if any, should be. If, for example, a plaintiff seeks an account against a defendant, the court will require the plaintiff to do equity by submitting himself to account in the same matter in which he asks an account; the reason of which is, that the court does not take accounts partially, and perhaps ineffectually, but requires that the whole subject be, once for all, settled between the parties: Clarke v. Tipping, 4 Beav. 594, 595. It is only (I may observe as a general rule) to the one matter which is the subject of a given suit that the rule applies, and not to distinct matters pending between the same parties: Whitaker v. Hall, 1 Glyn & J. 213. So, in the case of a bill for specific performance, the court will give the purchaser his conveyance, provided he will fulfill his part of the contract by paying the purchase-money; and *e converso*, if the vendor were plaintiff, the court will assist him only upon condition of his doing equity by conveying to the purchaser the subject of the contract upon receiving the purchase-money. In this, as in the former case, the court will execute the matter which is the subject of the suit, wholly, and not partially.

Fed. 263, 316, 31 U. S. App. 486, 15 C. C. A. 397.

(c) The text is quoted in Kempe v. Campbell, 44 Ohio St. 210, 216, 6 N. E. 566; cited in Mahoney v. Bostwick, 96 Cal. 53, 30 Pac. 1020, 31 Am. St. Rep. 175; Wells v. Francis, 7 Colo. 336, 4 Pac. 49, 55; Otis v. Gregory, 111 Ind. 504, 13 N. E. 39; Snow v. Blount, 182 Mass. 489, 65 N. E. 845 (citing this and following sections of the text); Interstate Sav. & L. Assn. v. Badgley, 115 Fed. 390; Bensiek v. Thomas, 66 Fed. 104; Brunner v. Warner, (Tenn. Ch. App.), 52 S. W. 668.

§ 386. **When Applicable.**— If we analyze this general formula, we shall obtain a more accurate notion of the real scope and effect of the principle. In the first place, the rule only applies where a party is appealing as *actor* to a court of equity in order to obtain some equitable relief; that is, either some relief equitable in its essential nature, as an injunction or a cancellation, or equitable because it may come within the power of the court to administer by virtue of its concurrent jurisdiction, as an accounting, or a pecuniary recovery; and it is necessarily assumed that the party would, but for the operation of the rule, be entitled to

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So, if a bill be filed by the obligor in an usurious bond, to be relieved against it, the court, in a proper case, will cancel the bond, but only upon terms of the obligor refunding to the obligee the money actually advanced. The reasoning is analogous to that in the previous cases. The equity of the obligor is to have the entire transaction rescinded. The court will do this so as to remit both parties to their original positions; it will not relieve the obligor from his liability, leaving him in possession of the fruits of the illegal transaction he complains of. I know of no case which cannot be explained upon this or analogous reasoning; and my opinion is, that the court can never lawfully impose merely arbitrary conditions upon a plaintiff, only because he stands in that position upon the record, but can only require him to give the defendant *that which by the law of the court,* independently of the mere position of the party on the record, is the right of the defendant in respect of the subject of the suit. A party, in short, does not, by becoming plaintiff in equity, give up any of his rights, or submit those rights to the arbitrary disposition of the court. He submits only to give the defendant *his* rights in respect of the subject-matter of the suit, on condition of the plaintiff obtaining his own. Cases may perhaps be suggested in which a question never can arise except against a plaintiff; but as a general proposition, it may, I believe, be correctly stated, that a plaintiff will never, in that character, be compelled to give a defendant anything but what the defendant might, as plaintiff, enforce, provided a cause of suit arose: Lady Elibank v. Montolieu, 5 Ves. 737; Sturgis v. Champneys, 5 Mylne & C. 102." It will appear subsequently that this last proposition of the learned judge is expressed in somewhat too strong terms, and requires important limitations upon its generality. See also the same view expressed by the same judge in Neeson v. Clarkson, 4 Hare, 97, 101; Sturgis v. Champneys, 5 Mylne & C. 97, 101, per Lord Cottenham: "There are many cases in which this court will not interfere with a right which the possession of a legal title gives, although the effect be directly opposed to its own principles as administered between parties having equitable interests only, such as in cases of subsequent encumbrancers without notice gaining a preference over a prior encumbrancer by procuring the legal estate. It may be to be regretted that the rights of property should thus depend upon accident, and all the relief which he demands.[a] Unless the party were otherwise so entitled, there would plainly be no occasion for invoking the rule. With respect to the terms which may be imposed upon the party as a condition to his obtaining the relief in accordance with the rule,— that is, the "equity" which he must do,— it is undoubtedly true, as said by Vice-Chancellor Wigram, that the court obtains no authority from this principle to impose any arbitrary conditions not warranted by the settled doctrines of equity jurisprudence; the court cannot deprive a plaintiff of his full equitable rights, under the pretense of awarding to the defendant something to which *he* has no equitable right, something which equity jurisprudence does not recognize. The principle only requires the plaintiff to do "equity." According to its true meaning, therefore, the terms imposed upon the plaintiff, as the condition of his obtaining the relief, must consist of the awarding or securing to the defendant something to which he is justly entitled by the principles and doctrines of equity, although not perhaps by those of the common law,— something over which he has a distinctively equitable right. In many cases, this right or

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be decided upon, not according to any merits, but upon grounds purely technical. This, however, has arisen from the jurisdiction of law and equity being separate, and from the rules of equity, though applied to subjects without its own exclusive jurisdiction, not having, in many cases, been extended to control matters properly subject to the jurisdiction of the courts of common law. Hence arises the extensive and beneficial rule of this court, that he who asks for equity must do equity; that is, this court refuses its aid to give to the plaintiff what the law would give him if the courts of common law had jurisdiction to enforce it, without imposing upon him conditions which the court considers he ought to comply with, *although the subject of the condition* should be one which this court would not otherwise enforce. If, therefore, this court refuses to assist a husband who has abandoned his wife, or the assignee of an insolvent husband who claims against both, in recovering the property of the wife, without securing out of it for her a proper maintenance and support, it not only does not violate any principle, but acts in strict conformity with a rule by which it regulates its proceedings in other cases."

(a) The text is cited to this effect in Flanary v. Kane (Va.), 46 S. E. 312; and cited generally in Bensiek v. Thomas, 66 Fed. 104; Otis v. Gregory, 111 Ind. 504, 13 N. E. 39.

relief thus secured to or obtained by the defendant, under the operation of the rule, might be recovered by him, if he as plaintiff, the parties being reversed, had instituted a suit in equity for that purpose. But this is not indispensable, nor is it even always possible. The rule may apply, and under its operation an equitable right may be secured or an equitable relief awarded to the defendant which could not be obtained by him in any other manner,— that is, which a court of equity, in conformity with its settled methods, either would not, or even *could* not, have secured or conferred or awarded by its decree in a suit brought for that purpose by him as the plaintiff.[1] [b]

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[1] Upon this point the last proposition of V. C. Wigram, in his opinion quoted *ante*, under § 385, is stated in much too strong terms, without the necessary qualifications. Indeed, one of the examples cited by him in a preceding sentence shows the incorrectness of his conclusion in this particular. The statement of the principle by Lord Cottenham is more accurate in this respect. One or two simple examples will illustrate. One of the most familiar applications of the rule is the "wife's equity," so called, the securing to her a portion of her own property, to which her husband becomes legally entitled by the marriage; whenever her husband or his assignee comes into a court of equity and seeks its aid to reach her property, the court may, under certain circumstances, compel the plaintiff, as a condition of his obtaining relief, to secure a portion of the property to the separate use of the wife by a settlement, although at law she has no right over it. This is sometimes done in a case where the wife herself could, by means of her own suit, have obtained the same relief; but it may also be done where, under the settled doctrines of equity, no such suit could be maintained by the wife. Under statutes against usury, which make void all usurious debts and obligations, the debtor may maintain a suit in equity for the purpose of procuring the usurious bond or other security to be surrendered up and canceled; but this relief will only be granted upon the condition that the plaintiff does equity by repaying to his creditor the amount which was actually loaned upon the security. In this instance, by the operation of the principle, the defendant obtains a relief which he could not possibly have obtained in any other manner; for if he had sued the debtor either at law or in equity to enforce the security and recover the debt, the defense of

(b) This portion of the text is enquoted in De Walsh v. Braman, 160 Ill. 415, 43 N. E. 597. The text is cited in Farmers' Loan & T. Co. v. Denver, L. & G. R. Co., 126 Fed. 46, 51, citing also many cases and holding that relief to the complainant may be conditioned on the enforcement of a claim or equity held by the defendant which, by reason of the statute of limitations or otherwise, the latter could not enforce in any other way.

§ 387. Finally, the principle will not apply so as to compel the plaintiff to do equity, where the relief sought by the plaintiff, and the equitable right or relief secured or awarded to the defendant, belong to or grow out of two entirely separate and distinct matters. The true meaning of the rule in this respect is, that the equitable right or relief secured to or conferred upon the defendant must be something connected with the subject-matter of the very suit or controversy for the proper decision of which the principle is invoked. Or, to state the same doctrine in more detailed and particular terms, "the rule is applied where the adverse equity to be secured or awarded to the defendant grows out of the very controversy before the court, or out of such transactions as the record shows to be a part of its history, or where it is so connected with the cause in litigation as to be presented in the pleadings and proofs, with full opportunity afforded to the party thus recriminated to explain or refute the charges."[1][a] If

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usury would be a complete bar. Again, in many of the states a tax-payer may maintain a suit in equity and restrain the collecting officer from enforcing payment of illegal taxes; but the relief of injunction will not be granted unless the plaintiff pays in full all that part of the tax assessed against him which is legal. Here also the defendant obtains a relief, under the operation of the principle, which he could obtain from the court of equity in no other manner; for the court would not sustain a suit in equity brought by the collecting officer to enforce payment of the tax; his only affirmative remedy would be either at law or by special statutory proceedings.

[1] Comstock v. Johnson, 46 N. Y. 615. Plaintiff and defendants were owners of adjoining mills. Plaintiff had the right to draw water for his mill from a dam belonging to defendants. Plaintiff, without any right, as it was held, erected a buzz-saw on an open space in front of defendants' mill, and propelled it by water from defendants' dam. Defendants thereupon shut off all the water supply to the plaintiff's works, that to the mill as well as that for the saw. Plaintiff brought a suit to restrain them from depriving him of the water. He was held to be entitled to the relief, but only upon con-

(a) The text is cited in Mahoney v. Bostwick, 96 Cal. 53, 30 Pac. 1020, 31 Am. St. Rep. 175; City of Chicago v. Union Stock Yards & Transit Co., 164 Ill. 224, 45 N. E. 430, 35 L. R. A. 281; Wells v. Francis, 7 Colo. 396, 4 Pac. 49, 55; John Amsfield Co. v. Edward B. Grossman & Co., 98 Ill. App. 180; Brunner v. Warner, (Tenn. Ch. App.), 52 S. W. 668. See also Bethea v. Bethea, 116 Ala. 265, 22 South. 561.

the conduct of the plaintiff, growing out of matters entirely distinct and unconnected with those embraced within the suit, can affect his right to obtain relief which would be otherwise proper, it must be by virtue of another equitable maxim, He who comes into a court of equity must come with clean hands.

§ 388. **Is a General Rule Regulating Equitable Reliefs.**— With this explanation of its scope and meaning, it may be regarded as a universal rule governing the court of equity in the administration of its remedies, that whatever may be the nature of the relief sought by the plaintiff, the equitable rights of the defendant, growing out of

dition that he discontinued the use of the saw. Church, C. J., said: "The rule of equity is, that he who asks equity must do equity. The plaintiff was in fault in using the buzz-saw on the defendants' premises. It is said that this was an independent transaction, for which the defendants might have an action; and this was the view of the court below. The rule referred to will be applied where the adverse equity grows out of the very transaction before the court, or out of such circumstances as the record shows to be a part of its history, or where it is so connected with the cause in litigation as to be presented in the pleadings and proofs, with full opportunity afforded to the party thus recriminated to explain or refute the charges: Tripp v. Cook, 26 Wend. 143; McDonald v. Neilson, 2 Cow. 139, 14 Am. Dec. 431; Casler v. Shipman, 35 N. Y. 533. It is not indispensable to the application of this rule that the fault of the plaintiff should be of such a character as to authorize an independent action for an injunction against him." This case well illustrates the point stated in the last preceding paragraph. The defendants here obtained, by operation of the rule, a relief which they could have obtained from a court of equity in no other manner. They could certainly have maintained no suit in equity to recover damages from the plaintiff, and it is probable that the court would not have sustained a suit brought by them to restrain the plaintiff's act, or to abate it as a nuisance, since the injury was not irreparable. For additional authorities which sustain the text, see Hanson v. Keating, 4 Hare, 1, 5, 6, per Wigram, V. C.; Whitaker v. Hall, 1 Glyn & J. 213; Colvin v. Hartwell, 5 Clark & F. 484; Com. Dig., tit. Chancery, 3, F, 3, citing Shish v. Foster, 1 Ves. Sr. 88; McDonald v. Neilson, 2 Cow. 139, 14 Am. Dec. 431; Tripp v. Cook, 26 Wend. 143; Casler v. Shipman, 35 N. Y. 533; N. Y. & N. H. R. R. v. Schuyler, 38 Barb. 534, 554; Finch v. Finch, 10 Ohio St. 501, 507. In this case the court say that the principle does not apply, "unless the mutual equities supposed by the maxim arise out of the subject-matter of the suit, and are such as have a foundation in established rules of law or of equity. The maxim invests courts of equity with no arbitrary discretion." There are cases in which the court has disregarded this restrictive feature of the rule laid down in the text. Thus, Secrest v. McKenna, 1 Strob. Eq. 356, was a suit for the or intimately connected with the subject of the controversy in question, will be protected; and for this purpose the plaintiff will be required, as a condition to his obtaining the relief which he asks, to acknowledge, admit, provide for, secure, or allow whatever equitable rights (if any) the defendant may have, and to that end the court will, by its affirmative decree, award to the defendant whatever reliefs may be necessary in order to protect and enforce those rights. This principle is not confined to any particular kind of equitable rights and remedies, but pervades the entire equity jurisprudence, so far as it is concerned with the administration of equitable remedies.[1] [a]

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specific performance of a contract for the sale of land, brought by the vendee. The plaintiff had fully paid the purchase price, and was clearly entitled to the usual decree for a conveyance, so far as the agreement itself was concerned. But defendant had become a surety on the official bond of the plaintiff as a sheriff, and, as such surety, had incurred liabilities on behalf of the plaintiff, which still remained undischarged. On this ground the defendant had refused to fulfill his agreement by conveying the land. The court sustained the defendant's contention, and refused to grant the relief sought by the plaintiff, expressly on account of the plaintiff's pecuniary liability arising from the sheriff's bond, saying: "It is a settled principle of the court not to grant merely equitable relief without requiring the party asking it to do equity himself,— to do what is morally right,— of which many examples might be given." This decision, plainly, cannot be sustained, in view of the overwhelming weight of opposing authority, English and American. See also Walling v. Aiken, 1 McMull. Ch. 1.

[1] Com. Dig., tit. Chancery, 3, F, 3, citing Towers v. Davys, 1 Vern. 480; Bradburne v. Amand, 2 Carth. 87; Smithson v. Thompson, 1 Atk. 520; Shish v. Foster, 1 Ves. Sr. 88; Shuttleworth v. Laycock, 1 Vern. 244; Kirkham v. Smith, 1 Ves. Sr. 258; Anonymous, 2 Show. 282; Lady Elibank v. Montolieu, 5 Ves. 737; Murray v. Lord Elibank, 10 Ves. 84, 1 Lead. Cas. Eq., 4th Am. ed., 623, 639, 670, and notes; Peacock v. Evans, 16 Ves. 512; Fanning v. Dunham, 5 Johns. Ch. 122, 9 Am. Dec. 283; Lanning v. Smith, 1 Pars. Cas. 16; Corby v. Bean, 44 Mo. 379; Richardson v. Linney, 7 B. Mon. 574; Sporrer v. Eifler, 1 Heisk. 636; Mumford v. Am. Life Ins. & T. Co., 4 N. Y. 463, 483; N. Y. & Harlem R. R. v. Mayor, etc., 1 Hilt. 562, 587; Linden v. Hepburn, 3 Sand. 668; Creath's Adm'r v. Sims, 5 How. 192, 204; Lewis v. Baird, 3 McLean, 56, 83.

(a) The text is quoted with approval in Chaney v. Coleman, 77 Tex. 100, 13 S. W. 850; State v. Snyder, 66 Tex. 687, 18 S. W. 106; and cited in Price v. Stratton (Fla.), 33 South. 644; Swope v. Missouri Trust Co., 26 Tex. Civ. App. 133, 62 S. W. 947.

§ 389. **Illustrations: The Wife's Equity.**— Having thus explained the principle in its generality, I shall now, by way of illustration, state some of the instances in which it has been applied. The most common and striking instance, at all events in England, is the "wife's equity," so called. By the common law the husband became absolute owner of all the wife's moneys, goods, and chattels, and things in action which he had reduced to possession, and estates for years, and acquired a life interest in all her freehold estates, and was entitled to their rents and profits. The only mode of securing any of her property to her own use during the marriage was by a marriage settlement. Courts of equity have, from a very early period, provided the wife a remedy against these harsh doctrines of the common law, where no proper settlement had already been made by the parties, by giving her a right to a provision out of her own property, when the circumstances were such that the principle, he who seeks equity must do equity, could be applied; and this right is known as her "equity to a settlement."[1] This right of the wife was first recognized in cases where the husband himself, or his assignee or creditor, or some other party claiming under or through him, resorted to the court as plaintiff, and sought its aid to enforce the husband's legal interest, and thus to obtain possession of property belonging to the wife. Avowedly acting upon the rule under discussion, the court established the doctrine that it would always require, as a condition of its granting the relief, that an adequate part of the property should be secured to the wife by a settlement.[2] Subsequently the court took a further step, and allows the wife, as plaintiff, under proper circumstances, to assert her equitable right by a suit in her own name.[3] It may therefore be regarded as the established general rule of equity, whether the wife is plaintiff suing on her own account, or the husband or some other party claiming under him is the plaintiff suing to reach the property, if the wife's property is within the reach of the court, as if it is vested in trustees, or has been paid into court, or is in any other situation which brings it within the control of the court, it will not be permitted to be removed out of that jurisdiction and control until an adequate provision is made for the wife, unless she has already been sufficiently provided for, or on her personal examination she waives her right.[4] This same rule was adopted and occasionally enforced in many of the American states, at a time when the common-law doctrines concerning the property relations between husband and wife were still unaltered, that is, prior to the modern legislation as to married women's property.[5] The importance of the rule, however, has been greatly lessened in England, and the rule itself has certainly become entirely useless and obselete in a great majority, if not indeed in all, of the states, from the effect of modern legislation. Recent statutes in nearly all, if not quite all, the states have deprived the husband of all interest in his wife's property during the marriage, have secured to her a perfect title in it, have removed it from all claims of her husband and of his creditors, have placed it under her exclusive control and separate use, and have generally given her full power or disposition over it.[6] It is perfectly obvious, therefore, that no circumstances could possibly arise under which the rule could be invoked and enforced on behalf of a married woman, in order to secure her own property, since it is already more completely secured to her by the statutes, and neither the husband, nor his assignee, nor his creditors, could ever maintain a suit in equity for the purpose of reaching it.[a]

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[1] See Jewson v. Moulson, 2 Atk. 417, per Lord Hardwicke; and Sturgis v. Champneys, 5 Mylne & C. 101, 105, per Lord Cottenham.

[2] Bosvil v. Brander, 1 P. Wms. 459.

[3] Lady Elibank v. Montolieu, 5 Ves. 737; Sturgis v. Champneys, 5 Mylne & C. 101, 105; Hanson v. Keating, 4 Hare, 1, 6; Eedes v. Eedes, 11 Sim. 569; Osborn v. Morgan, 9 Hare, 432, 434.

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[4] 1 Lead. Cas. Eq., 4th Am. ed., 623, 639, 670, and notes; Macauley v. Philips, 4 Ves. 19; Burdon v. Dean, 2 Ves. 607; Oswell v. Probert, 2 Ves. 680; Turner's Case, 1 Vern. 7, and notes; Ball v. Montgomery, 4 Brown Ch. 338; Pryor v. Hill, 4 Brown Ch. 139; Brown v. Clark, 3 Ves. 166; Freeman v. Parsley, 3 Ves. 421; Mitford v. Mitford, 9 Ves. 87; Wright v. Morley, 11 Ves. 12; Elliott v. Cordell, 5 Madd. 149; Vaughan v. Buck, 13 Sim. 404; Stanton v. Hall, 2 Russ. & M. 175; Wilkinson v. Charlesworth, 10 Beav. 324; Tidd v. Lister, 10 Hare, 140, 3 De Gex, M. & G. 857, 870; Ex parte Norton, 8 De Gex, M. & G. 258; Gleaves v. Paine, 1 De Gex, J. & S. 87; Spirett v. Willows, 3 De Gex, J. & S. 293, L. R. 1 Ch. 520, 522; Coster v. Coster, 9 Sim. 597; Bagshaw v. Winter, 5 De Gex & S. 466; Ex parte Pugh, 1 Drew. 202; Napier v. Napier, 1 Dru. & War. 407; Scott v. Spashett, 3 Macn. & G. 599; Gilchrist v. Cator, 1 De Gex & S. 188; Dunkley v. Dunkley, 2 De Gex, M. & G. 390, 396; Barrow v. Barrow, 5 De Gex, M. & G. 782; In re Ford, 32 Beav. 621; Marshall v. Fowler, 16 Beav. 249; Carter v. Taggart, 1 De Gex, M. & G. 286.

[5] Kenny v. Udall, 5 Johns. Ch. 464; Haviland v. Bloom, 6 Johns. Ch. 178, 180; Davis v. Newton, 6 Met. 544; Howard v. Moffatt, 2 Johns. Ch. 206, 208; Glen v. Fisher, 6 Johns. Ch. 33, 36, 10 Am. Dec. 310; Page v. Estes, 19 Pick. 269, 271; Gassett v. Grout, 4 Met. 486, 489; Gardner v. Hooper, 3 Gray, 398; Durr v. Bowyer, 2 McCord Eq. 368, 372; Duvall v. Farmers' Bank, 4 Gill & J. 283, 290, 23 Am. Dec. 558; Groverman v. Diffenderffer, 11 Gill & J. 15, 22; Tucker v. Andrews, 13 Me. 124, 128; Chase v. Palmer, 25 Me. 342, 348; Short v. Moore, 10 Vt. 446, 451; Barron v. Barron, 24 Vt. 375; Smith v. Kane, 2 Paige, 303.

§ 390. **Equitable Estoppel.**— As another example of the application of the principle: If the owner of an estate stands by and suffers another person, who is ignorant of his title or supposes himself to be entitled, to go on and expend money upon the estate, either by erecting buildings or by making other improvements, a court of equity will compel such owner, when he afterwards comes into it to assert his title, to indemnify the one who made the expenditure, either by making a pecuniary compensation, or in some cases, if the expenditure were by a lessee under a defective lease, by confirming and establishing the leasehold interest.[1] [a]

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[6] Statutes substantially to the effect described in the text are found in the following states: New York, California, Texas, Louisiana, Illinois, Iowa, Kansas, Massachusetts, Michigan, Nebraska, New Hampshire, Maine, Wisconsin, Alabama, Florida, Kentucky, Maryland, Minnesota, New Jersey. Oregon, Ohio, Pennsylvania, Rhode Island, Tennessee, Vermont, and without doubt in others.

[1] If the owner should resort to a court of law and bring an action of ejectment, a court of equity, at the suit of the party making the expenditure, would

§ 389, (a) For a discussion more in detail of the wife's equity, see §§ 1114–1118.

§ 390, (a) For a similar application see Broumel v. White, 87 Md. 521, 39 Atl. 1047. See also § 818.

§ 391. **Usury.**— Another remarkable application of the principle is seen in the action of the courts towards parties seeking its aid under the statutes against usury. Wherever the statutes have made usurious loans and obligations absolutely void, if a borrower brings a suit in equity for the purpose of having a usurious bond or other security surrendered up and canceled, the relief will be granted only upon condition that the plaintiff himself does equity by repaying to his creditor what is justly and in good faith due, that is, the amount actually advanced, with lawful interest; unless, indeed, the statute has gone so far as to expressly prohibit the court from imposing such terms as the price of its relief.[1] [a] The same principle has been applied to a lender seeking the aid of the court to reform a security tainted with usury.[2] The case is entirely different,

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work out the equitable principle by restraining the ejectment until compensation was made: See Powell v. Thomas, 6 Hare, 300; Ramsden v. Dyson, L. R. 1 H. L. Cas. 129.

[1] Fanning v. Dunham, 5 Johns. Ch. 122, 142, 143, 144, 9 Am. Dec. 283; Rogers v. Rathbun, 1 Johns. Ch. 367; Williams v. Fitzhugh, 37 N. Y. 444; Ballinger v. Edwards, 4 Ired. Eq. 449; Ware v. Thompson, 13 N. J. Eq. 66; Ruddell v. Ambler, 18 Ark. 369; Noble v. Walker, 32 Ala. 456; Sporrer v. Eifler, 1 Heisk. 633, 636; Mason v. Gardiner, 4 Brown Ch. 436. An amendment to the New York statute took away from the court the power of imposing such terms upon the borrower. See Bissell v. Kellogg, 60 Barb. 617.[b]

[2] Corby v. Bean, 44 Mo. 379. By the statute of Missouri, usurious contracts are not void *in toto,* but only as to the excess above the legal interest. Plaintiff brought the suit for the reformation of a trust deed, which, as appeared, had been given in the nature of a mortgage, to secure the payment

(a) The text is quoted in Kemper v. Campbell, 44 Ohio St. 210, 216, 6 N. E. 566; cited in Scott v. Austin, 36 Minn. 460, 32 N. W. 89; American Freehold L. & M. Co. v. Sewell, 92 Ala. 163, 9 South. 143, 13 L. R. A. 299. See also Ferguson v. Soden, 111 Mo. 208, 19 S. W. 727, 33 Am. St. Rep. 512; American Freehold L. & M. Co. v. Jefferson, 69 Miss. 770, 12 South. 464, 30 Am. St. Rep. 587; Cook v. Patterson, 103 N. C. 127, 9 S. E. 402; Ruppel v. Missouri Guarantee, S. & B. Ass'n, 158 Mo. 613, 59 S. W. 1000.

(b) Arkansas has a similar statute: Lowe v. Loomis, 53 Ark. 454, 14 S. W. 674; and Minnesota: Scott v. Austin, 36 Minn. 460, 32 N. W. 89, 864; Exley v. Berryhill, 37 Minn. 182, 33 N. W. 567; Mathews v. Missouri, K. & T. Trust Co., 69 Minn. 318, 72 N. W. 121; Missouri, K & T. Co. v. Krumseig, 172 U. S. 359, 19 Sup. Ct. 182; s. c. 77 Fed. 32, 23 C. C. A. 1, citing the author's note.

and another maxim governs its decision, when the lender sues in a court of equity to enforce a usurious obligation. The borrower may set up the defense and defeat the suit, without repaying any amount.[3] [c] The rule extends to all cases where a party seeks to have a contract set aside and canceled on the ground of its illegality in violating the provisions of some statute; the court will require him, as a condition to its granting the relief, to pay what is really due on the agreement, unless the illegality is a *malum in se*, or the statute itself prevents the imposition of such terms.[4] [d]

§ 392. **Other Special Instances.**— It is also an application of the principle, that where there has been some misdescription of the property on the part of the vendor, a court of equity will not decree a specific performance of the contract at his suit, except upon the terms that he makes proper compensation for the injury which the defendant has sustained from the misdescription.[1] Indeed, it is also by virtue of the rule, that the decree is made in all suits for specific performance of contracts, the plaintiff, whether purchaser or vendor, being compelled to perform his part of the agreement as a condition to his obtaining relief against the defendant.[2] The same is true with respect to

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of a promissory note upon which usurious interest had been charged. Before the court would grant the relief of reformation, it compelled the plaintiff to produce the note, and rebate the usurious interest.

[3] The maxim, He who comes into a court of equity must come with clean hands, applies to the plaintiff in this case: Mason v. Gardiner, 4 Brown Ch. 437; Union Bank v. Bell, 14 Ohio St. 200; Kuhner v. Butler, 11 Iowa, 419; Hart v. Goldsmith, 1 Allen, 145; Smith v. Robinson, 10 Allen, 130; Sporrer v. Eifler, 1 Heisk. 633, 636.

[4] Mumford v. Am. Life Ins. & T. Co., 4 N. Y. 463, 483. See, as to relief in case of illegal transactions, the next section.

[1] Hughes v. Jones, 3 De Gex, F. & J. 307, 315; Knatchbull v. Grueber, 1 Madd. 153; Scott v. Hanson, 1 Russ. & M. 128; Richardson v. Smith, L. R. 5 Ch. 648; Shaw v. Vincent, 64 N. C. 690; Davison v. Perrine, 22 N. J. Eq. 87; Foley v. Crow, 37 Md. 51.

[2] Hanson v. Keating, 4 Hare, 1, 4, 5, per Wigram, V. C.

(c) See Bigler v. Jack, 114 Iowa, 667, 87 N. W. 700.

(d) Cited to this point in Dean v. Robertson, 64 Miss. 195, 1 South. 159; New England M. S. Co. v. Powell, 97 Ala. 483, 12 South. 55. For a fuller discussion of the subject of this paragraph, see § 937.

the relief granted in suits for redemption brought either by a mortgagor or by a subsequent encumbrancer.[3] [a] And where a trustee had purchased land in his own name, but really for the benefit of the *cestui que trust*, and had paid the purchase-money with his own funds, and was also a creditor of the *cestui que trust* for other advances made to or for him, it has been held that such beneficiary could not compel a conveyance from the trustee to himself, except upon payment of his entire indebtedness, as well that growing out of this purchase as that arising from the other advances.[4] [b]

§ 393. The following are some additional miscellaneous examples: A contract for the purchase of lands was made in 1854, when the price was payable in gold. Subsequently, when the value of the premises had very greatly increased, and after the passage of the legal-tender act, the purchaser offered to pay the price in the United States legal-tender notes, which were then much depreciated, and, upon the vendor's refusal, brought this suit to compel a specific performance. The supreme court held that, under these circumstances, the plaintiff was not entitled to the relief except upon the condition of paying the price in gold.[1] In states where a court of equity exercises a jurisdiction to set aside or to restrain the collection of illegal assessments or taxes, the relief will not be granted unless the plaintiff pays such portion of the tax or assessment as is lawful and justly due.[2][a] Where a ward, immediately upon coming of age, transferred all his property to his guardian for an inadequate consideration, and released the guardian from all liabilities growing out of his trust, and afterwards brought a suit to set aside and cancel such conveyance, and for an accounting, the relief was only granted upon the terms of refunding the amount thus paid by the guardian, or giving him credit for such amount in the accounting.[3] Some further illustrations may be found in the footnote.[4][b]

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[3] Lanning v. Smith, 1 Pars. Cas. 16.

[4] Com. Dig., tit. Chancery, 3, F, 3, citing Bradburne v. Amand, 2 Cas. Ch. 87; and see Walling v. Aiken, 1 McMull. Ch. 1, where a mortgagor, on condition of redeeming the mortgage, was compelled to pay other and separate debts which he owed to the mortgagee. I doubt the correctness of these decisions. It is certainly difficult to reconcile either of them with the established doctrine that the adverse equities must both be connected with the subject-matter of the suit.

[1] Willard v. Tayloe, 8 Wall. 557; Wales v. Coffin, 105 Mass. 328; McGoon v. Shirk, 54 Ill. 408.

(a) See Levi v. Blackwell, 35 S. C. 511, 15 S. E. 243. Likewise, a suit cannot be maintained to have a deed declared a mortgage unless there is an offer to redeem: Mack v. Hill, 28 Mont. 99, 72 Pac. 307.

(b) The text is cited in San Antonio & G. S. R'y Co. v. San Antonio & G. R. Co., 25 Tex. Civ. App. 167, 60 S. W. 338; and in Wells v. Francis, 7 Colo. 396, 4 Pac. 49, 56, where, also, the correctness of this extension of the rule is questioned.

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[2] Board of Com'rs v. Elston, 32 Ind. 27, 2 Am. Rep. 327; Smith v. Auditor-General, 20 Mich. 398; Merrill v. Humphrey, 24 Mich. 170; Morrison v. Hershire, 32 Iowa, 271; Dean v. Charlton, 23 Wis. 590, 99 Am. Dec. 205.

[3] Richardson v. Linney, 7 B. Mon. 574.

[4] An invalid tax deed of the plaintiff's land was set aside as a cloud upon his title, only upon condition that he refunded all the taxes which had been advanced or paid by the party to whom the deed was given: Reed v. Tyler,

(a) People's Nat. Bank v. Marye, 191 U. S. 272, 24 Sup. Ct. 68; Koen v. Martin, 110 La. 242, 34 South. 429. But where the tax is entirely invalid, the rule, of course, does not apply: Boals v. Bachman, 201 Ill. 340, 66 N. E. 336.

See, on this subject, Pom. Equit. Remedies, chapter "Injunction against Taxation."

(b) It has been held (citing the editor's note to the second edition), that relief to the plaintiff may be conditioned on the enforcement of a claim held by the defendant which is barred by the statute of limitations: Farmers' Loan & T. Co. v. Denver, L. & G. R. R. Co., 126 Fed. 46. This is in accordance with that phase of the principle which is explained *ante*, end of § 386. A mortgagor seeking to quiet title against an illegal sale under the mortgage must offer to do equity by paying what is equitably due: Johnston v. S. F. Sav. Union, 75 Cal. 134, 16 Pac. 753, 7 Am. St. Rep. 129; Loney v. Courtnay, 24 Neb. 580, 39 N. W. 616; even though the statute of limitations has barred the debt: Booth v. Haskins, 75 Cal. 271, 17 Pac. 225; De Cazara v. Orena, 80 Cal. 132, 22 Pac. 74; Hall v. Arnot, 80 Cal. 348, 22 Pac. 200. The same is true of relief against other void judicial sales: Galveston, etc., R. R. Co. v. Blakeney, 73 Tex. 180, 11 S. W. 174; Robertson v. Bradford, 73 Ala. 116. A mortgagor who seeks to cancel a mortgage on his homestead as a cloud on his title, on the general ground of defects in its execution and acknowledgment, must offer to do equity by refunding the mortgage money with lawful interest: Grider v. American Freehold L. & M. Co., 99 Ala. 281, 12 South. 775, 42

§ 394. Is the Source of Certain Equitable Doctrines.— Thus far I have discussed the principle in the view taken of it by the great majority of judicial opinions, namely, as a universal rule guiding the court of equity in its administration of every kind of relief, and to be applied in practice

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56 Ill. 288.[c] A co-surety, asking to be relieved from a judgment against him for the whole demand secured, can only obtain the relief by paying his own contributory portion of the debt: Creed v. Scruggs, 1 Heisk. 590. A widow suing for her dower must account for the use, rent, and profits of the land which she has occupied in excess of her third: McLaughlin v. McLaughlin, 20 N. J. Eq. 190. On the other hand, if the heir sues to set aside his deed

Am. St. Rep. 58. One who seeks the reformation of a deed in his own favor will be denied relief, unless he is willing that other mistakes in the deed be reformed in favor of the defendants: Morisey v. Swinson, 104 N. C. 555, 10 S. E. 754. If a husband, after voluntarily conveying property to his wife, again conveys the same property in trust to secure money advanced at his request to discharge an existing lien against the property, the deed of trust cannot be set aside as a cloud on the wife's title, unless the money so advanced is repaid: Martin v. Martin, 164 Ill. 640, 45 N. E. 1007, 56 Am. St. Rep. 219. In Interstate Sav. & L. Ass'n v. Badgley, 115 Fed. 390, the maxim was applied, and the court held that a complaint by a savings and loan association to foreclose a mortgage was without equity, where it appeared that in order to procure the loan the mortgagor was obliged to subscribe for stock, and that the withdrawal value of the stock, plus the premiums paid by the mortgagor, etc., more than equaled the face of the loan, and that the interest paid on the average balance due on the loan amounted to about twelve per cent. See the following cases for miscellaneous illustrations: Neal v. Briggs, 110 Fed. 477; Hobbs v. Nashville, C. & St. L. R'y Co., 122 Ala. 602, 82 Am. St. Rep. 103, 26 South. 739; Taylor v. Dwyer, 131 Ala. 91, 32 South. 509; De Walsh v. Braman, 160 Ill. 415, 43 N. E. 597; Wicks v. Dean, 103 Ky. 69, 44 S. W. 397; Bunnell v. Bunnell, 23 Ky. L. Rep. 800, 64 S. W. 420; Anderson v. McNeal, (Miss.), 34 South. 1; Trenton Pass. R'y Co. v. Wilson, (N. J.), 40 Atl. 597; San Antonio & A. P. R'y Co. v. Gurley, (Tex.), 47 S. W. 513; Harrison v. Manson, 95 Va. 593, 29 S. E. 420; Ensign v. Batterson, (Conn.), 36 Atl. 51. For the important application of the maxim to parties seeking rescission or cancellation of transactions on the ground of fraud, mistake, etc., and the equitable theory of restoring all the parties to their original position, see § 910, and Pom. Equit. Remedies, chapter on "Cancellation." For its application to the cancellation of deeds, etc., of insane persons, see § 946. For its application in behalf of persons holding under defective title who in good faith have made improvements, see § 1241, note.

(c) See also Hickman v. Kempner, 35 Ark. 505; Alexander v. Merrick, 121 Ill. 606, 13 N. E. 190; Peckham v. Millikan, 99 Ind. 352; Steuart v. Meyer, 54 Md. 454.

according to the circumstances of the particular case before the court for decision. In this aspect of the principle it is not regarded as the source of any special doctrine of the equity jurisprudence, nor as the foundation of any special equitable interest or primary right. There is, however, another phase of the principle; it may be looked upon in another light. It is not wholly a rule for the guidance of the equity judge in measuring out and apportioning reliefs among litigants. It has exercised a molding influence in the development of important branches of the equity jurisprudence; certain doctrines are plainly derived from it as their chief, though not perhaps their only, source. The full scope and effect of such doctrines can only be understood by a clear perception of the relations which connect them with this their common origin. I shall therefore conclude the discussion of the present section by a brief mention of the doctrines which are thus, as it seems to me, directly referable to the principle that he who seeks equity must do equity.

§ 395. **Of Election.**— The relation which plainly connects all these doctrines with the principle in question is the fact

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to the widow, and for an accounting, he must allow to her one-third of the income in respect of her dower right: Ames v. Ames, 1 Cin. Rep. 559. A plaintiff suing in equity for a partition must contribute his proportion of a mortgage on the land which had been paid off by the defendant: Campbell v. Campbell, 21 Mich. 438; and see Comstock v. Johnson, 46 N. Y. 615 (*ante*, § 387, in note); Phillips v. Phillips, 50 Mo. 603; Kinney v. Con. Virginia M. Co., 4 Saw. 383; Boskowitz v. Davis, 12 Nev. 446; Scammon v. Kimball, 5 Biss. 431; Anderson v. Little, 26 N. J. Eq. 144; Lohman v. Crouch, 19 Gratt. 331; Lanning v. Smith, 1 Pars. Cas. 16. It is held that the principle also applies to a defendant who sets up an affirmative equitable defense claiming some affirmative relief, since he is then in exactly the same position as a plaintiff: See Tongue v. Nutwell, 31 Md. 302.[d] This must be the true limitation of the principle in its application to defendants; it certainly does not and cannot apply to defendants generally, who merely seek to defeat the plaintiff's demand, and ask no affirmative relief for themselves, either directly or indirectly. For example, the borrower, when sued upon a usurious obligation, may set up the defense of usury, without paying anything.

(d) In Charleston & W. C. R'y Co. v. Hughes, 105 Ga. 1, 70 Am. St. Rep. 17, 30 S. E. 972, it is held that the maxim applies to an intervenor.

that the equitable right or interest of one party, recognized and protected by each of them, always grows out of, or is necessarily connected with, the recognition and maintenance of the equitable right or interest of another party arising from the same transaction or subject-matter. In other words, the equity of one exists by the operation of the doctrine only because the equity of another is admitted and provided for. The doctrine itself is thus based upon the preservation of reciprocal or correlative equities. The first of the doctrines which I shall notice is that of *election.* This doctrine involves the notion that no man can claim inconsistent rights with regard to the same subject, and that any one who asserts an interest under an instrument is bound to give full effect to that instrument; he cannot both accept and reject it, or avail himself of its benefits as to a part, and defeat its provisions as to other parts. Election then originates in inconsistent or alternative donations,—two gifts, with the intention, express or implied, that one shall be a substitute for the other. The donee is entitled, not to both, but to the choice of either. The doctrine is applied under two somewhat differing states of circumstances, but the principle is the same in each. If the individual to whom, by an instrument of donation, a benefit is offered possesses a previous claim on the donor, and an intention appears that he shall not both receive the donation and enforce the claim, he is required by the doctrine to elect between his original and his substituted rights; the gift being designed as a satisfaction of the claim, he cannot accept the former without renouncing the latter. In the second case, the owner of an estate having, in an instrument of donation, applied to the property of another expressions which, were that property his own, would amount to an effectual disposition of it to a third person, and having by the same instrument disposed of a portion of his own estate in favor of the proprietor whose rights he assumed, the doctrine imposes upon that proprietor the duty of electing either to relinquish the benefit conferred upon him by the instrument, if he asserts his own inconsistent proprietary rights, or if he accepts that benefit, to complete the intended disposition by conveying, in conformity to it, that portion of his own property which it purports to affect.[1] It is very evident that this doctrine is based upon the principle that the party who, under such circumstances, asserts his equitable claim to one of his rights must also do equity by relinquishing the other to the persons who in that case are entitled to it, and to that end he is compelled to make an election between the two.

§ 396. **Of Marshaling.**—The second doctrine which I shall notice is that known as the *marshaling of securities.* "If a person who has two real estates mortgages both to one person, and afterwards only one estate to a second mortgagee, the court, in order to relieve the second mortgagee, has directed the first to take his satisfaction out of that estate only which is not in mortgage of the second mortgagee, if that is sufficient to satisfy the first mortgage, in order to make room for the second mortgage."[1] The same rule applies wherever one has any lien or security on two funds, and another has a subsequent lien on only one of them. This doctrine is plainly referable to the principle. The holder of the security on two funds is compelled to shape his own remedy, so as to preserve, if possible, the equity of the one whose lien extends to but one fund.[a] In fact, the whole theory with respect to the marshaling of as-

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§ 395, [1] Snell's Equity, 178, 179; Gretton v. Haward, 1 Swanst. 433, and note; Noys v. Mordaunt, 2 Vern. 581; Streatfield v. Streatfield, Cas. t. Talbot, 176, 1 Lead. Cas. Eq. 503, 510, 541.

§ 396, [1] Per Lord Hardwicke, in Lanoy v. Duke of Athol, 2 Atk. 446; Hughes v. Williams, 3 Macn. & G. 690; Tidd v. Lister, 10 Hare, 157, 3 De Gex, M. & G. 857; Heyman v. Dubois, L. R. 13 Eq. 158; Evertson v. Booth, 19 Johns. 486; Dorr v. Shaw, 4 Johns. Ch. 17; Kendall v. New England Co., 13 Conn. 384; House v. Thompson, 3 Head, 512.

(a) The text is quoted in Boone v. Clark, 129 Ill. 466, 21 N. E. 850, 5 L. R. A. 276; Breed v. National Bank of Auburn, 68 N. Y. Suppl. 68, 57 App. Div. 468, affirmed, 171 N. Y. 648, 63 N. E. 1115.

sets seems to be derived, in part at least, from the same source. A few other doctrines might, I think, be specified as thus related by a common descent; but enough has already been said to show the great importance of the principle, He who seeks equity must do equity, both as a practical rule governing the administration of remedies, and as the germ of equitable doctrines.

SECTION IV.

HE WHO COMES INTO EQUITY MUST COME WITH CLEAN HANDS.

ANALYSIS.

§ 397. General meaning of this principle.
§ 398. Is based upon conscience and good faith.
§ 399. Limitations upon it.
§§ 400–403. Illustrations of its application.
§ 400. In specific performance.
§ 401. In cases of fraud.
§ 402. In cases of illegality.
§ 403. Limitation in cases of fraud and illegality; parties not *in pari delicto*.
§ 404. Conclusion.

§ 397. **Its General Meaning.**[a]— This maxim is sometimes expressed in the form, He that hath committed iniquity shall not have equity. Like the one described in the preceding section, it is not, in its ordinary operation and effect, the foundation and source of any equitable estate or interest, nor of any distinctive doctrine of the equity jurisprudence; it is rather a universal rule guiding and regulating the action of equity courts in their interposition on behalf of suitors for any and every purpose, and in their administration of any and every species of relief. Resembling the former maxim in this respect, it differs from that principle

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(a) §§ 397–404 are cited in Snow v. Blount, 182 Mass. 489, 65 N. E. 845.

in some most important and essential features. In applying the maxim, He who seeks equity must do equity, as a general rule regulating the action of courts, it is necessarily assumed that different equitable rights have arisen from the same subject-matter or transaction, some in favor of the plaintiff and some of the defendant; and the maxim requires that the court should, as the price or condition of its enforcing the plaintiff's equity and conferring a remedy upon him, compel him to recognize, admit, and provide for the corresponding equity of the defendant, and award to *him* also the proper relief. The maxim does not assume that the plaintiff *has done* anything unconscientious or inequitable; much less does it refuse to him all relief; on the contrary, it grants to him the remedy to which he is entitled, but upon condition that the defendant's equitable rights are protected by means of the remedy to which *he* is entitled. On the other hand, the maxim now under consideration, He who comes into equity must come with clean hands, is much more efficient and restrictive in its operation. It assumes that the suitor asking the aid of a court of equity has himself been guilty of conduct in violation of the fundamental conceptions of equity jurisprudence, and therefore refuses him *all* recognition and relief with reference to the subject-matter or transaction in question. It says that whenever a party, who, as *actor,* seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him *in limine;* the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy.[b]

(b) Quoted in Lewis v. Holdrege, 56 Neb. 379, 76 N. W. 890; Pineville Land & Lumber Co. v. Hollingsworth, 21 Ky. L. Rep. 899, 53 S. W. 279. Cited in Michigan Pipe Co. v. Fremont Ditch, etc., Co., 111 Fed. 284, 49 C. C. A. 324; City of Chicago v. Union Stock Yards & Transit Co., 164 Ill. 224, 45 N. E. 430, 35 L. R. A. 281; Scott v. Austin, 36 Minn. 460, 32 N. W. 89, 864.

§ 398. **Is based upon Conscience and Good Faith.**— The principle involved in this maxim is merely the expression of one of the elementary and fundamental conceptions of equity jurisprudence. We have seen that in the origin of the jurisdiction the theory was adopted that a court of equity interposes only to enforce the requirements of conscience and good faith with respect to matters lying outside of, or sometimes perhaps opposed to, the law. The action of the court was, in pursuance of this theory, in a certain sense discretionary; and the terms "discretionary" and "discretion" are still occasionally used by modern equity judges while speaking of their jurisdiction and remedial functions. Whatever may be the strictly accurate theory concerning the nature of equitable interference, the principle was established from the earliest days, that while the court of chancery could interpose and compel a defendant to comply with the dictates of conscience and good faith with regard to matters outside of the strict rules of the law, or even in contradiction to those rules, while it could act *upon the conscience* of a defendant and force him to do right and justice, it would never thus interfere on behalf of a plaintiff whose own conduct in connection with the same matter or transaction had been unconscientious or unjust, or marked by a want of good faith, or had violated any of the principles of equity and righteous dealing which it is the purpose of the jurisdiction to sustain. While a court of equity endeavors to promote and enforce justice, good faith, uprightness, fairness, and conscientiousness on the part of the parties who occupy a defensive position in judicial controversies, it no less stringently demands the same from the litigant parties who come before it as plaintiffs or actors in such controversies. This fundamental principle is expressed in the maxim, He who comes into a court of equity must come with clean hands; and although not the source of any distinctive doctrines, it furnishes a most important and even universal rule affecting the entire administration of equity jurisprudence as a system of remedies and remedial rights.[1] [a]

§ 399. **Its Limitations.**— Broad as the principle is in its operation, it must still be taken with reasonable limitations; it does not apply to every unconscientious act or inequitable conduct on the part of a plaintiff. The maxim, considered as a general rule controlling the administration of equitable relief in particular controversies, is confined to misconduct in regard to, or at all events connected with, the matter in litigation, so that it has in some measure affected the equitable relations subsisting between the two parties, and arising out of the transaction; it does not extend to any misconduct, however gross, which is unconnected with the matter in litigation, and with which the opposite party has no concern. When a court of equity is appealed to for relief it will not go outside of the subject-matter of the controversy, and make its interference to depend upon the character and conduct of the moving party in no way affecting the equitable right which he asserts against the defendant, or the relief which he demands.[1] [a]

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§ 398, [1] Overton v. Banister, 3 Hare, 503; Lewis's Appeal, 67 Pa. St. 166; Johns v. Norris, 22 N. J. Eq. 102; Walker v. Hill, 22 N. J. Eq. 513; Wilson v. Bird, 28 N. J. Eq. 352; Bleakley's Appeal, 66 Pa. St. 187; Creath v. Sims, 5 How. 192; Weakley v. Watkins, 7 Humph. 356, 357; Atwood v. Fisk, 101 Mass. 363, 100 Am. Dec. 124; Gannett v. Albee, 103 Mass. 372; Marcy v. Dunlap, 5 Lans. 365; Paine v. Lake Erie, etc., R. R., 31 Ind. 283.

§ 399, [1] Lewis's Appeal, 67 Pa. St. 166; Meyer v. Yesser, 32 Ind. 294. In Lewis's Appeal, 67 Pa. St. 166, the court say: "It is not every unfounded claim which a man may make, or unfounded defense which he may set up, which will bar him from proceeding in a court of equity. The rule that he who comes into equity must come with clean hands must be understood to refer to willful misconduct in regard to the matter in litigation: Snell's Equity, 25. All the illustrations given in Francis's Maxims of Equity, 5, under the maxim, as he states it, He that hath committed iniquity shall not have equity, show this."

§ 398, (a) Cited in Michigan Pipe Co. v. Fremont Ditch, etc., Co., 111 Fed. 284, 49 C. C. A. 324; American Ass'n v. Innis, 109 Ky. 595, 60 S. W. 388. It is held, in accordance with the maxim, that a plaintiff who maintains a nuisance has no standing in equity to enjoin its unauthorized abatement: Pittsburgh, C., C. & St. L. R'y Co. v. Town of Crothersville, 159 Ind. 330, 64 N. E. 914.

§ 399, (a) The text is quoted in American Ass'n v. Innis, 109 Ky. 595, 60 S. W. 388; Rice v. Rockefeller, 134

§ 400. Illustrations — Specific Performance. — I shall now give some examples to illustrate the circumstances under which this principle operates in the administration of equitable relief, and the manner in which it is applied. The first instance which I shall mention is found in the familiar doctrine which controls the equitable remedy of the specific performance of contracts. A contract may be perfectly valid and binding at law; it may be of a class which brings it within the equitable jurisdiction, because the legal remedy is inadequate; but if the plaintiff's conduct in obtaining it, or in acting under it, has been unconscientious, inequitable, or characterized by bad faith, a court of equity will refuse him the remedy of a specific performance, and will leave him to his legal remedy by action for damages. It is sometimes said that the remedy of specific performance rests with the *discretion* of the court; but, rightly viewed, this discretion consists mainly in applying to the

N. Y. 174, 30 Am. St. Rep. 658, 31 N. E. 907, 17 L. R. A. 237; cited in Bethea v. Bethea, 116 Ala. 265, 22 South. 561; Foster v. Winchester, 92 Ala. 497, 9 South. 83; Moseler v. Jacobs, 66 Ill. App. 571; John Amsfield Co. v. Edw. B. Grossman & Co., 98 Ill. App. 180; Woodward v. Woodward, 41 N. J. Eq. 224, 4 Atl. 424; Langdon v. Templeton, 66 Vt. 173, 28 Atl. 866; Liverpool & L. & G. Ins. Co. v. Clunie, 88 Fed. 160; Viertel v. Viertel (Mo. App.), 75 S. W. 187. See also Cœur d'Alène Cons. & M. Co. v. Miners' Union, 51 Fed. 260, 19 L. R. A. 382; Shaver v. Heller & Merz Co., 108 Fed. 831, 48 C. C. A. 48, affirming 102 Fed. 882; General Electric Co. v. Wise, 119 Fed. 922; Trice v. Comstock, 121 Fed. 620, 61 L. R. A. 176, and cases cited; Yale Gas Stove Co. v. Wilcox, 64 Conn. 101, 128, 42 Am. St. Rep. 159, 173, 20 Atl. 303; Delaware Surety Co. v. Layton (Del. Ch.), 50 Atl. 378; Brown v. Jacobs Pharmacy Co., 115 Ga. 429, 41 S. E. 553, 90 Am. St. Rep. 126; City of Chicago v. Union Stock Yards & Transit Co., 164 Ill. 224, 45 N. E. 430, 35 L. R. A. 281; Hodge v. United States Steel Co., 64 N. J. Eq. 90, 53 Atl. 553; Kinner v. Lake Shore & M. S. R'y Co., 69 Ohio, 339, 69 N. E. 614; Upchurch v. Anderson (Tenn. Ch. App.), 52 S. W. 917; Post v. Campbell, 110 Wis. 378, 85 N. W. 1032. This maxim "denies all relief to a suitor, however well founded his claim to equitable relief may otherwise be, if, in granting the relief which he seeks, the court would be required, by implication even, to affirm the validity of an unlawful agreement, or give its approval to inequitable conduct on his part. But a court of equity is not an avenger of wrongs committed at large by those who resort to it for relief, however careful it may be to withhold its approval from those which are involved in the subject-matter of the suit, and which prejudicially affect the rights plaintiff the principle, He who comes into a court of equity must come with clean hands, although the remedy, under certain circumstances, is regulated by the principle, He who seeks equity must do equity. The doctrine, thus applied, means that the party asking the aid of the court must stand in conscientious relations towards his adversary; that the transaction from which his claim arises must be fair and just, and that the relief itself must not be harsh and oppressive upon the defendant. By virtue of this principle, a specific performance will always be refused when the plaintiff has obtained the agreement by sharp and unscrupulous practices, by overreaching, by concealment of important facts, even though not actually fraudulent, by trickery, by taking undue advantage of his position, or by any other means which are unconscientious; and when the contract itself is unfair, one-sided, unconscionable, or affected by any other such inequitable feature; and when the

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of one against whom relief is sought;" Kinner v. Lake Shore & M. S. R'y Co., 69 Ohio St. 339, 69 N. E. 614. Thus, it has been held or stated that the fact that plaintiff was a member of an illegal association or combination was no defense to a suit to enjoin ticket "scalping" (Kinner v. Lake Shore & M. S. R'y Co., 69 Ohio St. 339, 69 N. E. 614); or infringement of a patent (General Electric Co. v. Wise, 119 Fed. 922); or unlawful interference by a labor union (Cœur d'Alène Cons. & M. Co. v. Miners' Union, 51 Fed. 260, 19 L. R. A. 382). To a suit for injunction against the unfair use of the trade-name of one of complainant's products, it is no defense that other products manufactured by the complainant bore misleading names: Shaver v. Heller & Merz Co., 108 Fed. 821, 48 C. C. A. 48, affirming 102 Fed. 882. A railroad may enjoin a city from removing its tracks, although it has used its road for certain unauthorized purposes not involved in the suit: City of Chicago v. Union Stock Yards & Transit Co., 164 Ill. 224, 45 N. E. 430, 35 L. R. A. 281. To an injunction against a combination to destroy complainant's business it is no defense that complainant has on some occasions sold spurious goods: Brown v. Jacobs Pharmacy Co., 115 Ga. 429, 41 S. E. 553, 90 Am. St. Rep. 126, 57 L. R. A. 547. In Delaware Surety Co. v. Layton (Del. Ch.), 50 Atl. 378, the plaintiff sought an injunction to prevent the secretary of state from taking the plaintiff's certificate of incorporation into another state for use in a prosecution against its president and secretary for perjury in swearing to the certificate; it was held that such perjury was not so connected with the subject-matter as to justify the application of this maxim to the plaintiff's suit. The correctness of this decision seems doubtful.

specific enforcement would be oppressive upon the defendant, or would prevent the enjoyment of his own rights, or would in any other manner work injustice.[1][a] This application of the principle, better perhaps than any other, illustrates its full meaning and effect; for it is assumed that the contract is not illegal; that no defense could be set up against it at law; and even that it possesses no features or incidents which could authorize a court of equity to set it aside and cancel it. Specific performance is refused simply because the plaintiff does not come into court with clean hands.

§ 401. **Fraud.**— Another familiar illustration of the principle may be found in all cases where the plaintiff's claim is affected by his own fraud. Whatever be the nature of the plaintiff's claim and of the relief which he seeks, if his claim grows out of or depends upon, or is inseparably connected with, his own prior fraud, a court of equity will, in general, deny him any relief, and will leave him to whatever remedies and defenses at law he may have.[1][a] The maxim is more frequently invoked in cases upon fraudulent contracts. If a contract has been entered into through fraud, or to accomplish any fraudulent purpose, a court of equity will not, at the suit of one of the fraudulent parties,— *a particeps doli,*— while the agreement is still executory, either compel its execution or decree its cancellation, nor after it has been executed, set it aside, and thus restore the plaintiff to the property or other interests which he had fraudu-

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§ 400, [1] Willard v. Tayloe, 8 Wall. 557, 565, per Field, J.; Marble Co. v. Ripley, 10 Wall. 339, 356, 357; Fish v. Leser, 69 Ill. 394, 395; Stone v. Pratt, 25 Ill. 25, 34; Quinn v. Roath, 37 Conn. 16, 24; Cooper v. Pena, 21 Cal. 403, 411; Bruck v. Tucker, 42 Cal. 346, 353; Aston v. Robinson, 49 Miss. 348, 351; Weise's Appeal, 72 Pa. St. 351, 354; Snell v. Mitchell, 65 Me. 48, 50; Blackwilder v. Loveless, 21 Ala. 371, 374; Seymour v. De Lancey, 6 Johns. Ch. 222, 224; Eastman v. Plumer, 46 N. H. 464; Crane v. De Camp, 21 N. J. Eq. 414; Plummer v. Kepler, 26 N. J. Eq. 481; Sherman v. Wright, 49 N. Y. 227; Smoot v. Rea, 19 Md. 398; Phillips v. Stauch, 20 Mich. 369; Auter v. Miller, 18 Iowa, 405; Burke v. Seely, 46 Mo. 334; Mississippi, etc., R. R. v. Cromwell, 91 U. S. 643; Lamare v. Dixon, L. R. 6 H. L. 414, 423, per Lord Chelmsford.

§ 401, [1] Overton v. Banister, 3 Hare, 503, 506. An infant, fraudulently representing himself to be of age, obtained from trustees delivery of a certain amount of stock, to which he would be entitled upon his coming of age, and afterwards, when he *did* come of age, he demanded and received the rest of the stock. On account of this fraud, it was held that neither he nor his assignees

§ 400, (a) Cited in Michigan Pipe Co. v. Fremont Ditch, etc., Co., 111 Fed. 284, 49 C. C. A. 324. See also § 1404, and note to § 1405.

§ 401, (a) Trice v. Comstock, 115 Fed. 765; Richardson v. Walton, 49 Fed. 888 (fraud by a partner precludes bill by him to set aside contract dissolving partnership); Hanley v. Sweeny, 109 Fed. 712, 48 C. C. A. 612 (plaintiff by fraud procured the insertion of his name as purchaser in order confirming administrator's sale, and accordingly equitable relief to

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could compel repayment by the trustees of the amount which they had thus paid over during the minority, although such payment was in fact a breach of trust, and in the absence of the fraud the trustees would have been liable. Upon the subject of an infant's fraud in general, and its effect as viewed by equity, see Evroy v. Nicholas, 2 Eq. Cas. Abr. 488; Cory v. Gertcken, 2 Madd. 40; Nelson v. Stocker, 4 De Gex & J. 458, 464, per Knight Bruce, L. J.; Wright v. Snowe, 2 De Gex & S. 321. As another example, a party who fraudulently or wrongfully alters a written instrument cannot maintain a suit to obtain the remedy of a reformation: Marcy v. Dunlap, 5 Lans. 365; and see Bleakley's Appeal, 66 Pa. St. 187.

set aside deed to defendant, the true purchaser, was denied); Union Nat. Bank v. Hines, 177 Ill. 417, 53 N. E. 83; Morley Bros. v. Stringer (Mich.), 95 N. W. 978 (fraudulent grantee who pays a mortgage is not entitled to reimbursement from plaintiff in a creditor's bill); Morrison v. Juden, 145 Mo. 282, 46 S. W. 994; Hart v. Deitrich (Neb.), 96 N. W. 144 (partner who absconds with firm funds cannot subsequently obtain an accounting in equity); Farrow v. Holland Trust Co., 74 Hun, 585, 26 N. Y. Supp. 502; Robinson v. Brooks, 31 Wash. 60, 71 Pac. 721 (one who files a lien knowing it to contain non-lienable items, cannot maintain bill to foreclose it); Raasch v. Raasch, 100 Wis. 400, 76 N. W. 591. A creditor who obtains an assignment through fraud is not entitled to the aid of a court of equity to enforce his claim under the assignment: Commercial Nat. Bank v. Burch, 141 Ill. 519, 31 N. E. 420, 33 Am. St. Rep. 331. Knowingly and consciously making an untrue and excessive claim will defeat the right to a lien under a statute: Camden Iron Works v. City of Camden, 64 N. J. Eq. 723, 52 Atl. 477. One engaged in a fraudulent enterprise cannot complain that his partner in fraud did not keep faith: Bagwell v. Johnson, 116 Ga. 464, 42 S. E. 733.

In Edward Thompson Co. v. American Law Book Co. (C. C. A.), 122 Fed. 923, there are *dicta* to the effect that the publisher of a law encyclopædia which in some instances was guilty of "piracy" in copying the language of copyrighted works without the consent of the owners of the copyrights has no standing in a court of equity to complain of infringement of its copyright by a rival encyclopædia, consisting in copying lists of cases and authorities from complainant's work. But *quære*, whether complainant's misconduct was not unconnected with the matter in litigation, within the principle of § 399, *ante*.

lently transferred.[2][b] Equity will leave such parties in exactly the position in which they have placed themselves, refusing all *affirmative* aid to either of the fraudulent participants. The only equitable remedies which they can obtain are purely defensive. Upon the same principle, wherever one party, in pursuance of a prior arrangement, has fraudulently obtained property for the benefit of another, equity will not aid the fraudulent beneficiary by compelling a conveyance or transfer thereof to him; and generally, where two or more have entered into a fraudulent scheme for the purpose of obtaining property in which all are to share, and the scheme has been carried out so that all the results of the fraud are in the hands of one of the parties, a court of equity will not interfere on behalf of the others to aid them in obtaining their shares, but will leave the parties in the position where they have placed themselves.[3] [d]

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[2] Reynell v. Sprye, 1 De Gex, M. & G. 660, 688, 689 (decision dismissing the cross-bill of the defendant, Sprye); Wheeler v. Sage, 1 Wall. 518; Paine v. Lake Erie, etc., R. R., 31 Ind. 283; Creath v. Sims, 5 How. 192; White v. Crew, 16 Ga. 416, 420. One of the most common occasions for the enforcement of this rule arises in cases where a debtor has conveyed or assigned or in any manner transferred his property for the purpose of defrauding his creditors, and afterwards seeks to set aside the transfer as against the grantee or assignee and recover back the property. The door of a court of equity is always shut against such a claimant.[c] Freeman v. Sedwick, 6 Gill, 28, 39, 46 Am. Dec. 650; Stewart v. Iglehart, 7 Gill & J. 132, 28 Am. Dec. 202; Bolt v. Rogers, 3 Paige, 156; Stark's Ex'rs v. Littlepage, 4 Rand. 372; Janey v. Bird's Adm'rs, 3 Leigh, 510.

(b) The text is cited in McClintock v. Loisseau, 31 W. Va. 865, 8 S. E. 612, 2 L. R. A. 816. See also In re Great Berlin S. Co., L. R. 26 Ch. Div. 616; Kitchen v. Rayburn, 86 U. S. (19 Wall.) 254; Selz v. Unna, 73 U. S. (6 Wall.) 327; Randall v. Howard, 67 U. S. (2 Black) 585; Bartle v. Coleman, 29 U. S. (4 Pet.) 184; Schermerhorn v. De Chambrun, 64 Fed. 195, 12 C. C. A. 81, 26 U. S. App. 212 (contract to defraud creditors); Clark v. Buffalo Hump Min. Co., 122 Fed. 243; Kirkpatrick v. Clark, 132 Ill. 342, 22 Am. St. Rep. 531, 24 N. E. 71, 8 L. R. A. 511; Pearce v. Ware, 94 Mich. 321, 53 N. W. 1106; Helsley v. Futz, 76 Va. 671; Smith v. Chilton, 84 Va. 840, 6 S. E. 142; Bearden v. Jones (Tenn. Ch. App.), 48 S. W. 88; Lowther Oil Co. v. Miller-Sibley Oil Co., 53 W. Va. 501, 97 Am. St. Rep. 1027, 44 S. E. 433 (specific performance).

(c) **Conveyance in Fraud of Creditors.**— The text is cited in Sniper v. Kelleher (Wash.), 72 Pac. 67. See also Dent v. Ferguson, 132 U. S. 50, 10 Sup. Ct. 13; Brown v. Brown, 66 Conn. 493, 34 Atl. 490 (property conveyed by third party to defendant in trust for plaintiff, in order to defraud plaintiff's wife); Brady v. Huber, 197 Ill. 291, 64 N. E. 264, 90 Am. St. Rep. 161; Durand v. Higgins (Kan.), 72 Pac. 567 (grantor of conveyance in fraud of creditors cannot have his title quieted as against such conveyance); Hill v. Scott, 12 Ky. L. Rep. 877, 15 S. W. 667; Watts v. Vansant (Md.), 58 Atl. 433; Moore v. Jordan, 65 Miss. 229, 3 South. 737, 7 Am. St. Rep. 641; White v. Cuthbert, 41 N. Y. Supp. 818, 10 App. Div. 220 (cancellation of note given to assist fraudulent attachment refused); Pride v. Andrews, 51 Ohio St. 405, 38 N. E. 84, and cases cited; Hukill v. Yoder, 189 Pa. St. 233, 43 Wkly. Notes Cas. 347, 42 Atl. 122; Craig v. Craig (W. Va.), 46 S. E. 371. And see all the cases collected in note, 3 Am. St. Rep. 727. In Bush v. Rogan, 65 Ga. 320, 38 Am. Rep. 785, it is held that the grantee can maintain ejectment against the grantor; but see Kirkpatrick v. Clark, 132 Ill. 342, 22 Am. St. Rep. 531, 24 N. E. 71, 8 L. R. A. 511.

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[3] Johns v. Norris, 22 N. J. Eq. 102; Walker v. Hill, 22 N. J. Eq. 513; Bleakley's Appeal, 66 Pa. St. 187; Musselman v. Kent, 33 Ind. 452; Hunt v. Rowland, 28 Iowa, 349; Hibernian, etc., Soc. v. Ordway, 38 Cal. 679. In Johns v. Norris, 22 N. J. Eq. 102, where a widow, by a prior arrangement, procured a third person to buy in the real estate of her husband at a foreclosure sale at a price far below its real value, by contrivances agreed upon to deter other persons from bidding, and by giving out that the purchase was for the benefit of the widow and her family, it was held that she was a participant in the fraud against the heirs and creditors, and did not come into court with clean hands, in a suit to compel the confederate to convey the land to her, and relief was therefore refused. In Walker v. Hill, 22 N. J. Eq. 513, the same was held with respect to an execution debtor who had by a secret arrangement procured a person to buy in the property at the execution sale for the debtor's benefit, in such a manner as to be fraudulent against other creditors and purchasers. The court refused to grant relief by compelling a conveyance by the purchaser to the execution debtor. In Bleakley's Appeal, 66 Pa. St. 187, the principle was applied under different circumstances. One I. was the vendee under a land contract, and had paid part of the purchase price. A judgment was then recovered against him by L.; whereupon I. assigned the contract to B., antedating the assignment, so that it appeared to precede the recovery of the judgment. This assignment was made both by I. and B. for the purpose of defrauding L. B. afterwards paid to the vendor in the land contract the residue of the purchase-money. L. in the mean time issued an execution, and I.'s interest under the land contract was sold at execution sale, and bought in by the judgment creditor, L. L. brings this suit against the vendor to compel a specific performance of the contract by a conveyance to himself. Held, that L. was entitled to such specific performance and con-

(d) The text is quoted in Milhaus v. Sally, 43 S. C. 318, 21 S. E. 268, 885, 49 Am. St. Rep. 834. And see Lawton v. Estes, 167 Mass. 181, 45 N. E. 90, 57 Am. St. Rep. 450.

§ 402. **Illegality.**— Another very common occasion for invoking the principle is illegality.[a] Wherever a contract or other transaction is illegal, and the parties thereto are, in contemplation of law, *in pari delicto,* it is a well-settled rule, subject only to a few special exceptions depending upon other considerations of policy, that a court of equity will not aid a *particeps criminis,* either by enforcing the contract or obligation while it is yet executory, nor by relieving him against it, by setting it aside, or by enabling him to recover the title to property which he has parted with by its means. The principle is thus applied in the same manner when the illegality is merely a *malum prohibitum,* being in contravention to some positive statute, and when it is a *malum in se,* as being contrary to public policy or to good morals.[b] Among the latter class are agreements and transfers the consideration of which was violation of chastity, compounding of a felony, gambling, false swearing, the commission of any crime, or breach

veyance by the vendor, without repaying to B. the amount of the purchase price which *he* had paid to the vendor. Speaking of B.'s claim to be repaid, the court said: "He (B.), standing thus before a chancellor, cannot ask him to make repayment to him a condition to a decree removing the fraudulent obstruction he threw in the way. The payment is one of the very steps he took to consummate the fraud upon L. If he have a legal right of recovery, he must resort to his action at law; if he can have none, it is a test of his want of equity. And in addition to all this, it is a rule that a chancellor will not assist a party to obtain any benefit arising from fraud. He must come into a court of equity with clean hands. It would be a singular exercise of equity which would assist a party, who had paid money to enable him to perpetrate a fraud, to recover his money, just when the chancellor was engaged in thrusting out of the way of his doing equity to the injured party the very instrument of the fraud. He who does iniquity shall not have equity: Hershey v. Weiting, 14 Wright, 244." See also Odessa Tramways Co. v. Mendel, L. R. 8 Ch. Div. 235.

[a] This section of the text is cited in Basket v. Moss, 115 N. C. 448, 20 S. E. 733, 44 Am. St. Rep. 463, 48 L. R. A. 842; Booker v. Wingo, 29 S. C. 116, 7 S. E. 49. The subjects treated in this and the following paragraph are discussed more at length in §§ 937–942.

[b] This portion of the text is quoted in Greer v. Payne, 4 Kan. App. 153, 46 Pac. 190; Vincent v. Moriarty, 52 N. Y. Supp. 519.

of good morals.[1] It should be observed, however, in order to avoid any misapprehension and seeming inconsistency in the decisions, that there are agreements which appear, at first blush, to be founded upon an immoral consideration, or which would at one time perhaps have been regarded as contrary to public policy, which courts of equity do not consider to be illegal, and which they will therefore enforce, if properly coming within their jurisdiction. Of

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[1] Cases of illegal contracts upon a consideration in violation of chastity:[c] Benyon v. Nettlefield, 3 Macn. & G. 94, 102, 103; Bodly v. ———, 2 Cas. Ch. 15, per Lord Nottingham; Whaley v. Norton, 1 Vern. 482; Bainham v. Manning, 2 Vern. 242; Spicer v. Hayward, Prec. Ch. 114; Dillon v. Jones, cited in 5 Ves. 290; Franco v. Bolton, 3 Ves. 368; Batty v. Chester, 5 Beav. 103; Smyth v. Griffin, 13 Sim. 245; Priest v. Parrot, 2 Ves. Sr. 160; Cray v. Rooke, Cas. t. Talb. 153; Hill v. Spencer, Amb. 641, 836; Gray v. Mathias, 5 Ves. 286; Clark v. Periam, 2 Atk. 333. In the following cases relief was given, in some to the man or his representatives, in others to the woman, upon contracts of the same general nature; but on examination none of them will be found in opposition to the principle: the exact question either was not raised by the pleadings, or the consideration was not, in the view of the court, illegal: Sismey v. Eley, 17 Sim. 1; Knye v. Moore, Sim. & St. 61; Matthew v. Hanbury, 2 Vern. 187; Robinson v. Cox, 9 Mod. 263; Clark v. Periam, 2 Atk. 333; Marchioness of Annandale v. Harris, 2 P. Wms. 432; Hall v. Palmer, 3 Hare, 532. Cases where the agreement was upon a gambling consideration, or a lottery, etc.:[d] Weakley v. Watkins, 7 Humph. 356, 357; Paine v. France, 26 Md. 46; but where money had been loaned expressly to enable the borrower to pay a gambling debt, it does not come within the rule, and can be recovered back: Ex parte Pyke, 8 Ch. Div. 754, 756, 757. Cases where the agreement or transfer was made upon the consideration of compounding a felony, or of promising not to prosecute for some crime:[e] Harrington v. Bigelow, 11 Paige, 349; Atwood v. Fisk, 101 Mass. 363, 100 Am. Dec. 124; Swartzer v. Gillett, 1 Chand. 207, 209, 210; but see Davies v. London, etc., Co., L. R. 8 Ch. Div. 469. This and other cases of the same class in which relief is given are explained in the next succeeding paragraph and the note thereunder. Cases in which the agreement or transaction is illegal, because contrary to the provisions of some positive statute or to public policy:[f] In re Arthur Average Ass'n, L. R. 10 Ch.

(c) A contract in consideration of or relating to illicit sexual relations will not be enforced: Chateau v. Singla, 114 Cal. 91, 45 Pac. 1015, 55 Am. St. Rep. 63, 33 L. R. A. 750; Watkins v. Nugen (Ga.), 45 S. E. 262; Brindley v. Lawton, 53 N. J. Eq. (8 Dick) 259, 31 Atl. 394 (bill to compel restoration of stock given in consideration of illicit relations cannot be sustained).

(d) Board of Trade v. O'Dell Commission Co., 115 Fed. 574 (bucket shop); Baxter v. Deneen (Md.), 57 Atl. 601; Stewart v. Parnell, 147 Pa. St. 523, 23 Atl. 838, 29 Wkly. Notes Cas. 537.

(e) Compounding a felony: Rock v. Mathews, 35 W. Va. 531, 14 S. E. 137, 14 L. R. A. 508; Treadwell v. Torbert, 119 Ala. 279, 24 South. 54, 72 Am. St. Rep. 918. Agreements not to prosecute: Moore v. Adams, 8 Ohio (8 Ham), 372, 32 Am. Dec. 723; George v. Curtis, 45 W. Va. 1, 30 S. E. 69.

(f) Teoli v. Nardolillo, 23 R. I. 87, 49 Atl. 489 (accounting between partners engaged in unlawful business).

542; In re South Wales, etc., Co., L. R. 2 Ch. Div. 763; Sykes v. Beadon, L. R. 11 Ch. Div. 170, 183, 197; Thomson v. Thomson, 7 Ves. 470; Regby v. Connol, L. R. 14 Ch. Div. 482, 491; Carey v. Smith, 11 Ga. 539, 547. In the first two cases above named, it was held that an association, illegal because not organized in conformity with certain mandatory statute, cannot be "wound up" by a court of equity. In Sykes v. Beadon, L. R. 11 Ch. Div. 170, a company had been formed for the purpose of making investments and dealing in securities, all the members having signed articles of association. This association was held illegal, because it violated certain statutes, and, among others, the acts against lotteries. A large amount of capital had been sunk, and the managers or trustees had committed some gross breaches of their trust. This suit was brought by a share-holder against some of the trustees, to compel them to carry out the trusts, and to make them liable for the sums lost through their breaches of trust. The questions were very fully discussed by Jessel, M. R., who held that the suit could not be maintained. He said (p. 193): "Now, the authorities on the subject seem to be quite plain when you come to examine them. They are really to this effect, that you cannot ask the aid of a court of justice to carry out an illegal contract; but in cases where the contract is actually at an end, or is put an end to, the court will interfere to prevent those who have, under the illegal contract, obtained money belonging to other persons on the representation that the contract was legal, from keeping that money." Again, he said at page 197: "I think the principle is clear that you cannot directly enforce an illegal contract, and you cannot ask the court to assist you in carrying it out. You cannot enforce it indirectly; that is, by claiming damages or compensation for the breach of it, or contribution from the persons making the profits realized from it. It does not follow that you cannot, in some cases, recover money paid over to third persons in pursuance of the contract; and it does not follow that you cannot, in other cases, obtain, even from the parties to the contract, moneys which they have become possessed of by representations that the contract was legal, and which belonged to the persons who seek to recover them; but I am bound to say I think there is no pretense for saying that an illegal contract will in any way be enforced or aided by a court of law or equity." In Regby v. Connol, L. R. 14 Ch. Div. 482, 491, a member of a "trades union" had been expelled for violating certain rules of the society which were stringently in restraint of trade, and he brought this suit to be restored to his rights of membership and the property rights belonging thereto. Trades unions had been legalized by an act of Parliament for certain specified purposes, but not for all purposes. The court held that, independent of the statute, the society and the articles of agreement between its members were clearly illegal, because contrary to public policy; that the suit did not come within the operation of the statute; and therefore a court of equity could give the plaintiff no relief. In Carey v. Smith, 11 Ga. 539, 547, both parties had been engaged this kind are some contracts made upon the consideration of an improper cohabitation being terminated, and those providing for children born from such cohabitation.[2]

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in transactions violating the statutes concerning banking. See also Johnson v. Shrewsbury, etc., R'y, 3 De Gex, M. & G. 914, per Knight Bruce, L. J.; Aubin v. Holt, 2 Kay & J. 66, 70, per Page Wood, V. C.[s]

[2] With respect to contracts upon the consideration mentioned in the text, see the following cases, cited in the last note: Sismey v. Eley, 17 Sim. 1; Knye v. Moore, 1 Sim. & St. 61; Matthew v. Hanbury, 2 Vern. 187; Robinson v. Cox, 9 Mod. 263; Clark v. Periam, 2 Atk. 333; Marchioness of Annandale v. Harris, 2 P. Wms. 432; Hall v. Palmer, 3 Hare, 532. It is now settled that an agreement of separation between a husband and wife is not illegal, not against public policy, and if drawn in a proper form, so that there are two parties capable of contracting, will be specifically enforced at the suit of either spouse: Besant v. Wood, L. R. 12 Ch. Div. 605, 620–624; Wilson v. Wilson, 1 H. L. Cas. 538; Hunt v. Hunt, 4 De Gex, F. & J. 221, 233; Marshall v. Marshall, 27 Week. Rep. 399; Flower v. Flower, 20 Week. Rep. 231. The earlier decisions were undoubtedly the other way. See Aylett

(s) **Miscellaneous Cases.**— Agreements in unreasonable restraint of trade or tending to monopoly are illegal and will not be enforced in equity: American Biscuit Co. v. Klotz, 44 Fed. 721; Pacific Postal Tel. Cable Co. v. Western Union Tel. Co., 50 Fed. 493 (injunction); Chicago Gas Light Co. v. Gas Light Co., 121 Ill. 530, 13 N. E. 169, 2 Am. St. Rep. 124 (specific performance); South Chicago City Ry. Co. v. Calumet Electric St. R'y Co., 171 Ill. 391, 49 N. E. 576 (specific performance). Trade-mark cases.— No relief against infringement will be granted when plaintiff's trade-mark or trade-name is a fraud on the public: Manhattan Med. Co. v. Wood, 108 U. S. 218, 2 Sup. Ct. 436; Worden v. California Fig Syrup Co., 187 U. S. 516, 23 Sup. Ct. 161; Preservaline Mfg. Co v. Heller Chem. Co., 118 Fed. 103; Siegert v. Abbott, 61 Md. 276, 48 Am. Rep. 101; Kenny v. Gillet, 70 Md. 574, 17 Atl. 499; Parlett v. Guggenheimer, 67 Md. 542, 10 Atl. 81, 1 Am. St. Rep. 416; Messer v. The Fadettes, 168 Mass. 140, 60 Am. St. Rep. 371, 46 N. E. 407, 37 L. R. A. 721; McVey v. Brendel, 144 Pa. St. 235, 22 Atl. 912, 29 Wkly. Notes Cas. 1, 27 Am. St. Rep. 625, 13 L. R. A. 377; Lemke v. Dietz (Wis.), 98 N. W. 936. Contract or conveyance against policy of United States land laws is illegal, and will not be enforced: Dial v. Hair, 18 Ala. 798, 54 Am. Dec. 179 (specific performance refused); Beck v. Flournoy Live-Stock & R. E. Co., 65 Fed. 30, 12 C. C. A. 497, 27 U. S. App. 618 (injunction against interference by government refused). A contract to stifle bidding at a judicial sale will not be specifically enforced: Camp v. Bruce, 96 Va. 521, 31 S. E. 901, 70 Am. St. Rep. 873, 43 L. R. A. 146. A champertous contract will not be specifically enforced: Casserleigh v. Wood, 119 Fed. 309, (C. C. A.). An injunction will not issue at the suit of a person conducting an illegal business to restrain a police captain from stationing officers continuously on the premises: Weiss v. Herlihy, 49 N. Y. Supp. 81, 23 App. Div. 608. An injunction will not issue to restrain a

§ 403. Limitations — Parties not in Pari Delicto.[a]—Upon the general doctrine stated in the preceding paragraphs concerning the effect of fraud and illegality upon the remedial rights of parties seeking the aid of equity, there are certain limitations, founded mainly upon motives of policy, which require a brief mention. Wherever a case falls within the limitation, and not within the general rule, the court may give relief against the improper transaction, or may even enforce the obligation arising from the tainted agreement, at the suit of one of the parties thereto. The first of these limitations may be given in the following general formula, and all the others may be regarded as merely particular deductions or corollaries from it. Assuming that

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v. Ashton, 1 Mylne & C. 105; Duke of Bolton v. Williams, 2 Ves. 138. In Besant v. Wood, L. R. 12 Ch. Div. 605, Jessel, M. R., reviews the authorities, and discusses at length the legal meaning and effect of "public policy." In Fisher v. Apollinaris Co., L. R. 10 Ch. 297, 302, 303, it was held by the court of appeal, as a general rule, that where an offense is of such a nature that the offender may be proceeded against either criminally or civilly, or both, and he is prosecuted criminally, there is nothing illegal nor improper in a compromise of the whole proceedings; such agreement of compromise is valid, and will be enforced by equity, if coming within the equitable jurisdiction. It should be observed, however, that this rule is confined to those wrongs which are capable *at the common law* of being prosecuted both civilly and criminally; it does not, of course, extend to offenses for which modern statutes have given an action at law for damages, such as homicide.[h]

postmaster from interfering with plaintiff's mail, when plaintiff has been engaged in a fraudulent scheme: Public Clearing House v. Coyne, 121 Fed. 927. Further illustrations: Harton v. McKee. 73 Fed. 556; Simonds v. East Windsor Elect. R'y Co., 73 Conn. 513, 48 Atl. 210; Meyers v. Merillion, 118 Cal. 352, 50 Pac. 662; Garrett v. Kansas City Coal Min. Co., 113 Mo. 330, 20 S. W. 965, 35 Am. St. Rep. 713; Brooks v. Cooper, 50 N. J. Eq. 761, 26 Atl. 978, 35 Am. St. Rep. 793, 21 L. R. A. 617; Harvey v. Linville Imp. Co., 118 N. C. 693, 24 S. E. 489, 54 Am. St. Rep. 749, 32 L. R. A. 265; Markley v. Mineral City, 58 Ohio St. 430, 51 N. E. 28, 65 Am. St. Rep. 776.

(h) It was held, however, in Windhill Local Board v. Vint, 45 Ch. Div. 351, that any agreement to compromise or postpone a prosecution for a *public* offense — as an interference with a public highway — is illegal; and Fisher v. Apollinaris Co., L. R. 10 Ch. 297, so far as it holds otherwise, is overruled. See further, last note, under § 936.

(a) This paragraph of the text was cited, but held inapplicable to the facts of the case, in Milhaus v. Sally, 43 S. C. 318, 21 S. E. 268, 885, 49 Am. St. Rep. 834.

a contract is fraudulent, or against public policy, or illegal, still, where the parties to it are not *in pari delicto,* and where public policy is considered as advanced by allowing either, or at least the most excusable of the two, to sue for relief, relief may be given to him, either against the transaction by setting it aside and restoring him to his original position, or even, in some cases, by enforcing the contract, if executory.[1][b] The second limitation I cannot better state than in the carefully considered language of the present master of rolls, Sir George Jessel, in a very recent case: "You cannot ask the aid of a court of justice to carry out an illegal contract; but in cases where the contract is actually at an end, or is put an end to, the court will interfere to prevent those who have, under the illegal contract, obtained money belonging to other persons, on the representation that the contract was legal, from keep-

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[1] This general limitation is thus stated by Knight Bruce, L. J., in the great case of Reynell v. Sprye, 1 De Gex, M. & G. 660, 679: "But where the parties to a contract against public policy, or illegal, are not *in pari delicto* (and they are not always so), and where public policy is considered as advanced by allowing either, or at least the most excusable of the two, to sue for relief against the transaction, relief is given to him, as we know from various authorities." I cannot at present enter into any discussion of the rule, nor describe the kinds of contracts in which the parties are not *in pari delicto,* so that the court may aid the one who is comparatively innocent. The whole subject is discussed in a most able and exhaustive manner, the authorities are reviewed, and the contracts to which the rule applies are described and classified by Selden and Comstock, JJ., in Tracy v. Talmage, 14 N. Y. 162, 67 Am. Dec. 132, and by some of the opinions in the great case of Curtis v. Leavitt, 15 N. Y. 9. See also Osborne v. Williams, 18 Ves. 379; Prescott v. Norris, 32 N. H. 101; White v. Franklin Bank, 22 Pick. 186; Lowell v. Boston, etc., R. R., 23 Pick. 32, 34 Am. Dec. 33; Bellamy v. Bellamy, 6 Fla. 62, 103. Among the ordinary instances where equity will set aside a fraudulent or illegal transaction at the suit of the party supposed to be comparatively innocent, wholly on grounds of public policy, is the familiar case of a borrower suing to have the usurious contract and securities surrendered up and canceled, and where, in a composition purporting to be effected on terms of equality by an insolvent with all his creditors, secret bargains are made with some of them by which they are to obtain more favorable terms than the others, or where, in an assignment by an insolvent, a secret arrangement is made with the assignee in order to secure benefits out of the property to the debtor or his family, such agreements, being in fraud of creditors, will be set aside by

(b) This paragraph of the text was cited and followed in Duval v. Wellman, 124 N. Y. 158, 26 N. E. 343 (marriage brokerage contract); Donnelly v. Rees (Cal.), 74 Pac. 433 (conveyance obtained by undue influence); Daniels v. Benedict, 50 Fed. 347 (divorce fraudulently obtained).

For cases where public policy is promoted by allowing a party equally guilty with the other to sue for relief, see *post,* § 941, and notes; Missouri, K. & T. Co. v. Krumseig, 77 Fed. 32, 40 U. S. App. 620, 23 C. C. A. 1 (usurious contract); Cox v. Donnelly, 34 Ark. 762 (contract in violation of the homestead act); Duval v. Wellman, 124 N. Y. 158, 26 N. E. 343 (marriage brokerage contract); Basket v. Mars, 115 N. C.

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a court of equity, even at the suit of the insolvent himself. Such relief, however, is plainly not given out of consideration for the debtor, but solely for the purpose of protecting the creditors: See Eastabrook v. Scott, 3 Ves. 456; Cullingworth v. Loyd, 2 Beav. 385, 390, note; McNeill v. Cahill, 2 Bligh, 228; Bellamy v. Bellamy, 6 Fla. 62, 103, and cases cited. The following are some particular illustrations: In Benyon v. Nettlefold, 3 Macn. & G. 94, a gentleman had given a deed containing covenants binding him to pay an annuity to trustees for the benefit of a certain woman during her life. The real consideration of this deed was continued furtive cohabitation with the woman as his mistress; but another consideration was stated in the deed, so that it was valid on its face. An action at law was brought against him to recover the unpaid amount of the annuity. It was well settled that he would have a perfect defense at law if the real facts as to the consideration could be brought out in evidence. He then filed a bill in equity for the purpose solely *of obtaining a discovery* from the other parties as to the real nature of the consideration, but not asking any relief against the instrument. Upon demurrer to the bill the court held that while a suit for relief could not be maintained under these circumstances, a suit for discovery alone in aid of the defense at law was proper, and a discovery would be compelled. In Osbaldiston v. Simpson and Bowles, 13 Sim. 513, the plaintiff had given to Simpson, for the benefit of Bowles, his promissory notes, which said defendants had obtained from the plaintiff by threatening to accuse him of having cheated Bowles at cards, and to sue him for the penalties for that offense under a certain statute. It was held that the plaintiff was entitled to a decree for the surrender of and cancellation of the notes, even on the assumption that he had actually been guilty of the alleged cheating. See also Worthington v. Curtis, L. R. 1 Ch. Div. 419; Davies v. London, etc., Co., L. R. 8 Ch. Div. 469; Odessa Tramways Co. v. Mendel, L. R. 8 Ch. Div. 235; Ex parte Pyke, L. R. 8 Ch. Div. 754.

448, 20 S. E. 733, 44 Am. St. Rep. 463, 48 L. R. A. 842.

For cases where the parties were not *in pari delicto*, see *post*, § 942, and notes; Daniels v. Benedict, 50 Fed. 347; Missouri, K. & T. Co. v. Krumseig, 77 Fed. 32; Donnelly v. Rees (Cal.), 74 Pac. 433; Herrick v. Lynch, 150 Ill. 283, 37 N. E. 221; Davidson v. Carter, 55 Iowa, 117, 7 N. W. 466; Williams v. Collins, 67 Iowa, 413, 25 N. W. 682; Anderson v. Merideth, 82 Ky. 564; Harper v. Harper, 85 Ky. 160, 7 Am. St. Rep. 583, and note, 3 S. W. 5; Harris v. Carmody, 131 Mass. 51, 41 Am. Rep. 188; O'Connor v. Ward, 60 Miss. 1025; Holliway v. Holliway, 77 Mo.

ing that money. . . . . It does not follow that you cannot, in some cases, recover money paid over to third persons in pursuance of the contract; and it does not follow that you cannot, in other cases, obtain, even from the parties to the contract, moneys which they have become possessed of by representations that the contract was legal, and which belong to the persons who seek to recover them."[2] One of the parties to an illegal contract may therefore, in some cases, maintain a suit against a third person to recover money which the latter has received under the contract.[3]

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[2] Sykes v. Beadon, L. R. 11 Ch. Div. 170, 193, 197.

[3] Thus if a trust should be created whereby A was illegally to pay money to the trustee, B, for the benefit of C, the beneficiary could not compel A to make the payment; but if A should voluntarily pay over the money into the hands of B, the beneficiary, C, could then maintain a suit and recover the money, and B could not set up the illegality of the original trust as a defense, and thus retain the property: Thomson v. Thomson, 7 Ves. 470; Tenant v. Elliott, 1 Bos. & P. 3; Farmer v. Russell, 1 Bos. & P. 296; Sharp v. Taylor, 2 Phill. Ch. 801; Joy v. Campbell, 1 Schoales & L. 328, 339; McBlair v. Gibbes, 17 How. 237; Brooks v. Martir, 2 Wall. 81; Tracy v. Talmage, 14 N. Y. 162, 67 Am. Dec. 132. In Tenant v. Elliott, 1 Bos. & P. 3, there was an illegal contract between the plaintiff and a third person. The defendant received money in pursuance of the contract from that third person to the use of the plaintiff. It was held that the plaintiff could recover such money from the defendant, although he could not have enforced the contract against the third person. In Farmer v. Russell, 1 Bos. & P. 296, there was an illegal contract between the plaintiff and a third person, by which the plaintiff agreed to deliver certain counterfeit coins to the third person for a stipulated price. The defendants were carriers employed by the plaintiff to deliver the articles and receive the price, which they did. The plaintiff suing the carriers to recover the money in their hands, the defense of illegality was set up, but overruled, and the plaintiff was held entitled to maintain the suit. Sharp v. Taylor, 2 Phill. Ch. 801, was decided in accordance with the same rule, but upon quite different circumstances. It has been regarded as a leading case, and has been followed by subsequent

392; Kleeman v. Peltzer, 17 Nebr. 381, 22 N. W. 793; Ford v. Harrington, 16 N. Y. 285; Eadie v. Slimmon, 26 N. Y. 9, 82 Am. Dec. 395; Boyd v. De la Montagnie, 73 N. Y. 498, 29 Am. Rep. 197; Schoener v. Lissauer, 107 N. Y. 112, 13 N. E. 741; Adams v. Irving Nat. Bank, 116 N. Y. 606, 15 Am. St. Rep. 447, 23 N. E. 7, 6 L. R. A. 491; Foley v. Greene, 14 R. I. 618, 51 Am. Rep. 419; Gorringe v. Reed, 23 Utah, 120, 63 Pac. 902, 90 Am. St. Rep. 692; Harrington v. Grant, 54 Vt. 236; Malbye v. Malbye, 15 Wash. 648, 47 Pac. 16; Clemens v. Clemens, 28 Wis. 637, 9 Am. Rep. 520.

In order, however, that such legal relations may arise incidentally and collaterally from an illegal contract, the illegality itself must not be of a nature intrinsically immoral or evil; it must be an illegality resulting from motives of expediency or policy. In all the cases where a right of action arising collaterally from an illegal contract has been thus recognized and enforced, it will be found that the agreement was illegal because opposed to some statute, or to so-called public policy.

decisions; but some of the reasoning of Lord Cottenham, in his opinion, is sharply criticised, and shown to be unsound, by Sir George Jessel, in the recent case, already quoted, of Sykes v. Beadon, L. R. 11 Ch. Div. 170, 195, 196.[c] The following are very recent examples of the application of this rule: In Worthington v. Curtis, L. R. 1 Ch. Div. 419, 423, 424, a father took out a policy of life insurance in the name of and on the life of his son, in whose life he had no insurable interest, which policy was in fact intended by the father for his own benefit alone. The policy, as between the company and the assured, was illegal and void, under certain statutes. The son died intestate, and the company voluntarily paid the sum insured by the policy to his administrator. Held, that although neither the father nor the administrator of the son could have maintained any action on the policy against the company on account of its illegality, yet the money having been voluntarily paid by the company, as between the father and the estate of the son, the father was entitled to such money, and could recover the same. In Davies v. London, etc., Ins. Co., L. R. 8 Ch. Div. 469, 477, the manager of the company accused one of their agents, named Evans, of embezzlement, and threatened to prosecute him. In order to prevent the threatened prosecution, the plaintiff, in pursuance of an agreement to that effect with the manager, deposited a sum of money with a third person, and now sues to recover it back. The company defended on the ground that the

(c) In McDonald v. Lund, 13 Wash. 412, 43 Pac. 348, it was held, chiefly in reliance on these English cases, that when plaintiff had been engaged with defendant in an illegal gambling business, and after the business had terminated left in defendant's hands the undivided profits of the business, under an agreement that he was entitled to a certain portion thereof, the plaintiff might recover the sum thus left on deposit. It is plain that this decision is quite unsupported by the English cases cited, in all of which the fruits of the illegal transaction were deposited with a third party. For cases illustrating the rule which sometimes permits a party to an agreement prohibited by statute, or *ultra vires*, and not involving a *malum in se*, to recover money or property in the hands of the other party, see *post*, § 942, latter part of author's note 2; Bond v. Montgomery, (Ark.), 20 S. W. 525, citing this paragraph of the text (statute imposed penalty on one party only, who was the party defendant in the suit).

§ 404. **Conclusion.**— The special rules contained in the foregoing paragraphs will serve to illustrate the meaning and operation of the principle, He who comes into a court of equity must come with clean hands; but they by no means exhaust its scope and effect. It is not alone fraud or illegality which will prevent a suitor from entering a court of equity; any really unconscientious conduct, connected with the controversy to which he is a party, will repel him from the forum whose very foundation is good conscience.[a]

agreement was illegal, and that the court would not aid a *particeps criminis*. Held, that even if the agreement was illegal, as compounding a felony, the court would interfere in a case where the money was actually in the hands of trustees, or where pressure had been used to obtain it. The court said (p. 477): "It is said that, assuming the contract to be illegal, Davies was equally a party to that illegal contract, and that therefore the court will stay its hand, and then the maxim, *In pari delicto melior est conditio defendentis*, will prevail. But, in the first place, there is great difficulty in applying that principle to a case where money has been placed *in medio*, and where the court must do something with it, or else leave it to be locked up forever. In the next place, it appears to me to be clear that illegality resulting from pressure, and illegality resulting from an attempt to stifle a prosecution, do not fall within that class of illegalities which induce the court to stay its hand, but are of a class in which the court has actively given its assistance in favor of the oppressed party, by directing the money to be repaid." He cites, as sustaining this conclusion, the case of Williams v. Bayley, L. R. 1 H. L. 200; and the case of Osbaldiston v. Simpson, 13 Sim. 513, the facts of which are stated *ante*, is also directly in point. See also Ex parte Pyke, L. R. 8 Ch. Div. 754, in which it was held that money loaned to enable the borrower to pay a bet illegal by statute could be recovered back. For another and different mode in which the general limitation described in the text may operate, see Powell v. Knowler, 2 Atk. 224. A and B had made an agreement for the division and conveyance to each other of parts of certain land which they expected to recover. This contract was champertous and illegal, and could not, *as a contract*, be enforced. But one of the parties, who had thus agreed to convey a portion of the land to the other, by a clause in his will directed the agreement to be performed, and created a trust for that purpose. It was held that the trust thus created by the will should be enforced against the trustee, although the original contract was also thereby specifically performed.

(a) The text is quoted in Brotzman's Appeal, 119 Pa. St. 645, 13 Atl. 483.

SECTION V.

EQUALITY IS EQUITY.

ANALYSIS.

§ 405. Its general meaning.
§§ 406–411. Its effects upon certain equitable doctrines.
§§ 406, 407. Of *pro rata* distribution and contribution.
§ 408. Ownership in common.
§ 409. Joint indebtedness; liability of estate of deceased joint debtor.
§ 410. Settlement of insolvent estates; marshaling of assets.
§ 411. Abatement of legacies; apportionment of liens; appointment under trust powers; contribution among co-sureties and co-contractors.
§ 412. Conclusion.

§ 405. Its General Meaning.[a]—We have seen in the opening paragraphs of the introductory chapter that the notion of equality or impartiality—*æquum*—lay at the very foundation of the *æquitas* as conceived of by the Roman jurists; the same idea was, from the outset, incorporated into the equity jurisprudence created by the English court of chancery, and has been perpetuated in all of its doctrines into which the notion could possibly enter, until the present day. While the common law looked at and protected the rights of a person as a separate and distinct individual, equity rather regards and maintains, as far as possible, the rights of *all* who are connected by *any* common bond of interest or of obligation. The principle, Equality is equity, or Equity delighteth in equality, is of very wide and general application. It is the immediate and conceded source of several important and distinctive doctrines of the equity jurisprudence. But this is not all. It furnishes a practical rule for the guidance of equity courts in their administration of reliefs, whenever they obtain jurisdiction over a great variety of cases, unless some compulsory dogma of the law stands in the way. I shall briefly mention the im-

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(a) Sections 405–412 are cited in Campau v. Detroit Driving Club (Mich.), 98 N. W. 267.

portant equitable doctrines which are derived from this principle, and indicate a few of the cases in which it operates as a rule controlling the administration of reliefs.

§ 406. **Is the Source of Certain Equitable Doctrines — Pro Rata Distribution and Contribution.**— Wherever a number of persons had separate claims against the same individual or the same fund, the law generally gave certain classes of such claimants a complete precedence, even to the exhaustion of the fund if necessary, over the others, arising solely from the *form* of their security; as, for example, bond and other specialty creditors over simple contract creditors. Also, among several persons having claims of the same grade against a single individual or fund, the one who by his superior activity, either by means of action and judgment or not, obtains payment of his demand the first in order of time, is entitled at law to the precedence thus acquired over the others, even though they should thereby be prevented, in whole or in part, from procuring satisfaction. Conversely, it is a familiar doctrine of the law, that when a creditor has a single claim against several persons, each of such debtors is regarded as so completely and individually liable that the creditor may enforce payment of the entire demand from any one of the number. The law will not interfere with the action of the creditor; it will not compel him in any manner to obtain satisfaction from all of the debtors *pari passu;* and after one of the number had thus been obliged to pay the whole amount, the ancient common law, prior to its adoption of doctrines borrowed from equity, failed to give him any right of recourse upon his co-debtors by means of which the burden might finally be distributed among them all in just proportions. The rules of the modern law giving such right of reimbursement are a direct importation from the equity jurisprudence. Finally, the common law, prior to statutory changes, exhibited a decided preference, in fact leaned very strongly, in favor of *joint* ownership over ownership in common, and in favor of a joint right among creditors over a several right, and a joint liability among debtors over a several or joint and several liability, with all the legal consequences of "survivorship," and of an extinction of the right or liability on the part of any one of the creditors or debtors who dies. Under all these conditions of fact, equity proceeded upon a very different principle, upon the principle that equality is equity, that the right or burden should be equalized among all the persons entitled to participate. It must not be understood, however, that a court of equity would always directly interfere with parties under the circumstances above mentioned, for the purpose of carrying out the principle of equality; it could not, for example, restrain a creditor from prosecuting his legal demand by legal means, *merely* on the ground that the result would give him a precedence over others; in other words, the principle of equality is equity was not of itself the source of an equitable jurisdiction which would not otherwise have existed. The true doctrine is, that wherever a court of equity, upon any ground of equitable cognizance, acquires jurisdiction over a case falling under the general condition of fact mentioned above, it will apply the principle of equality in determining the collective rights and liabilities of all the parties.

§ 407. Under the limitation last stated, that the subject-matter properly belongs to the equitable jurisdiction, the following general principle may be regarded as firmly established and of wide application: Whenever several persons are all entitled to participate in a common fund, or are all creditors of a common debtor, equity will award a distribution of the fund, or a satisfaction of the claims, in accordance with the maxim, Equality is equity; in other words, if the fund is not sufficient to discharge all claims upon it in full, or if the debtor is insolvent, equity will incline to regard all the demands as standing upon an equal footing, and will decree a *pro rata* distribution or payment. On the other hand, whenever a common liability rests upon several persons in favor of a single claimant, equity will enforce such liability upon all the class in accordance with the same maxim, Equality is equity. It will apply the maxim either directly, by apportioning the burden *ratably* among all the individuals upon whom the common liability rests, or indirectly, by giving a right of *contribution* to the member of the class from whom a payment of the whole demand has been obtained, and enabling him to recover contributory shares of the amount from the other members of the class, by which means the entire burden is finally adjusted upon and among them all. It will be easily seen upon examination that this comprehensive principle of equity lies at the foundation of several well-settled doctrines of the jurisprudence, and that it furnishes the rule upon which a court of equity proceeds to award its relief in numerous cases which do not fall within either of these special doctrines.

§ 408. **Ownership in Common.**— One of the most remarkable illustrations of the principle, being in direct antagonism with a specially favorite dogma of the old common law, is seen in the preference which equity gives to ownership in common over joint ownership of lands. It may be stated as a general proposition that equity *always* leans in favor of ownership in common, and wherever it is possible to do so, will hold an ownership to be in common, and thereby disregard the legal right of survivorship, although at law the ownership would be strictly joint. It was an invariable rule of the common law that when purchasers take a conveyance to themselves and their heirs, they will be joint tenants, and upon the death of one of them the estate will go to the survivor. The same rule prevails in equity, unless circumstances exist from which a contrary intention of the parties may be presumed, enabling a court of equity to disregard the legal rule.[1] The same is true of a joint contract to purchase land, made by two or more vendees, where they have paid or agreed to pay the purchase price in equal proportions. Equity would regard their right as a *joint* one, and upon the death of one vendee would not decree a conveyance to the survivor and the heirs of the deceased vendee as owners in common.[2] Although the legal rule was allowed to operate under these special circumstances, still, equity leans very strongly against joint ownership. Whenever circumstances occur from which it can reasonably be implied that a tenancy in common was intended, a court of equity will hold the ownership to be in common, and will disregard the legal right of survivorship by declaring the survivors to be trustees of the legal estate for the representatives of the deceased purchaser or owner. In pursuance of this view, the doctrine was well settled, long previous to all legislation on the subject, that where two or more purchase lands and advance or agree to pay the purchase-money in *unequal* proportions, this makes them in the nature of partners, and however the legal estate may survive on the death of one of them, the survivor will be considered in equity as only a trustee for the representatives of the other, in proportion to the sums advanced by each of them.[3] [a] This equitable doctrine is always applied to mortgagees. Where money is

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[1] In Lake v. Gibson, 1 Eq. Cas. Abr. 290, pl. 3, Sir Joseph Jekyll, M. R., said that "where two or more purchase land and advance the money in *equal* proportions, and take a conveyance to them and their heirs, they will be held *joint* tenants in equity, as well as at law, upon this principle, that it may be presumed they intended to purchase jointly the chance of survivorship. The

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rule of law, therefore, not being repugnant to the presumed intention of the parties, will be followed in equity." See also Taylor v. Fleming, cited in York v. Eaton, Freem. 23; Rigden v. Vallier, 3 Atk. 735, 2 Ves. Sr. 258; Harris v. Fergusson, 16 Sim. 308.

[2] Aveling v. Knipe, 19 Ves. 441, per Sir William Grant, M. R.; Davis v. Symonds, 1 Cox, 402.

[3] Lake v. Gibson, 1 Eq. Cas. Abr. 294, pl. 3, 1 Lead. Cas. Eq., 4th Am. ed., 264, 268; Rigden v. Vallier, 3 Atk. 735, 2 Ves. Sr. 258; Duncan v. Forrer. 6 Binn. 193, 196; Caines v. Lessee of Grant, 5 Binn. 119, 120; Currie v. Tibb's Heirs, 5 T. B. Mon. 440, 443; Overton v. Lacy, 6 T. B. Mon. 13, 15, 17 Am. Dec. 111; Cuyler v. Bradt, 2 Caines Cas. 326; Mayburry v. Brien, 15 Pet. 21, 36. The soundness of this distinction between equal and unequal advances has been doubted. See note, by Mr. Vesey, to Jackson v. Jackson, 9 Ves. 597; but the doctrine is expressly sustained and approved by the high authority of Lord St. Leonards. See Sugden on Vendors, 11th ed., p. 902.

(a) See Palmer v. Rich, (1897) 1 Ch. 134, 143.

advanced by two or more persons, no matter whether in equal or unequal proportions, and they take a mortgage to themselves jointly, in law their estate is joint, and on the death of one the debt and the security would belong wholly to the survivor. In equity, however, the interest of the mortgagees is in common, and on the death of one the survivor is held a trustee for the personal representatives of the deceased mortgagee.[4] These equitable doctrines, drawing such a distinction between conveyances, contracts for purchase, and mortgages at law and in equity, were established before any statutes had changed the legal view, but they have become unnecessary and obsolete in the United States, in consequence of modern legislation. This legislation throughout all the states has declared that a conveyance of land to two or more grantees shall, unless a contrary intention is clearly expressed, create an ownership in common, and not a joint ownership. As the original doctrine of equity is thus incorporated into the law by statute, there is no longer any need of the equitable rule as above described. Furthermore, either as an inference from the statutes, or from the gradual adoption of equitable principles, the right and interest of two or more vendees in a contract for the purchase of land is no longer strictly joint, even at law, in a great majority of the states; that is, the right and interest of the heirs and representatives of a deceased vendee are fully recognized and protected. Finally, by the equitable theory of the mortgage, which, as has been shown, prevails in nearly all the states, the interest of the mortgagee being regarded as personal property, and not as an estate in the land, the right of two or more mortgagees is not strictly joint, when considered with reference to third persons, or even to the mortgagor himself.

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[4] Petty v. Styward, 1 Ch. Rep. 3, 1 Eq. Cas. Abr. 290; Rigden v. Vallier, 2 Ves. Sr. 258; Morley v. Bird, 3 Ves. 631, per Lord Alvanley, M. R.; Robinson v. Preston, 4 Kay & J. 505, 511; Randall v. Phillips, 3 Mason, 378, 384; Appleton v. Boyd, 7 Mass. 131, 134; Goodwin v. Richardson, 11 Mass. 469; Kinsley v. Abbott, 19 Me. 430, 434.

§ 409. **Joint Liability — Death of a Joint Debtor.**—Another admirable illustration of the principle that equality is equity is shown in the case, analogous to the one last described, of the mode in which equity treats a liability arising out of contract joint at law. It is one of the oldest and most familiar doctrines of the law, that when two or more persons promise or bind themselves to pay a sum of money, or to do any other act, their obligation and liability are joint. It followed from the legal conception of a *joint* obligation that when one of the joint debtors dies, the liability on his part and on the part of his estate *ipso facto* ceases, and the only obligation for the entire debt rests, at law, upon the survivor or survivors; he or they alone could be sued at law by the creditor.[1] The injustice which might result from this purely technical rule of the law is very apparent. The doctrine of equity is quite different. Presuming upon the reasonable presumption that it is the intention of the parties in every such agreement that the creditor shall have the several as well as the joint obligation of each debtor as a security for the payment or performance, equity declares, as a general rule, that every contract merely joint at law shall be regarded, as against the debtor parties, a joint and several undertaking, creating a joint and several obligation. As a consequence of this equitable view of the obligation, the doctrine is settled, that upon the death of one of the debtors the liability does not remain upon the survivors alone. If the survivors or survivor are insolvent, or if the creditor has exhausted his ordinary legal remedies against them in vain, by means of a judgment and an execution returned unsatisfied, then such creditor may maintain a suit in equity against the personal representatives of the deceased debtor, and enforce payment out of his estate.[2] In England, the doctrine, as settled by the modern decisions is still broader and more efficient. The creditor is entitled to sue the personal representatives of the deceased debtor in equity at once, without attempting, much less exhausting, any legal remedy against the survivor. In other words, the creditor has at all times the option to sue the survivor at law or the representatives of the deceased in equity, whether the survivors are solvent or not; and this rule has been adopted in some of the American states.[3] In certain of the states, the common-

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[1] Ex parte Kendall, 17 Ves. 525; Gray v. Chiswell, 9 Ves. 118; Weaver v. Shryock, 6 Serg. & R. 262, 264; Cairns v. O'Bleness, 40 Wis. 469; Jones v. Keep, 23 Wis. 45; Morehouse v. Ballou, 16 Barb. 289.

[2] Voorhis v. Child's Ex'rs, 17 N. Y. 354; Richter v. Poppenhausen, 42 N. Y.

373; Pope v. Cole, 55 N. Y. 124, 14 Am. Rep. 198; Lane v. Doty, 4 Barb. 534; Bentz v. Thurber, 1 Thomp. & C. 645; Yates v. Hoffman, 5 Hun, 113; Masten v. Blackwell, 8 Hun, 313; Bradley v. Burwell, 3 Denio, 61; Maples v. Geller, 1 Nev. 233, 237, 239; Fowler v. Houston, 1 Nev. 469, 472; Barlow v. Scott's Adm'r, 12 Iowa, 63; Pecker v. Cannon, 11 Iowa, 20; Marsh v. Goodrell, 11 Iowa, 474; Williams v. Scott's Adm'r, 11 Iowa, 475; People v. Jenkins, 17 Cal. 500; Humphreys v. Crane, 5 Cal. 173; May v. Hanson, 6 Cal. 642 (but see Bank of Stockton v. Howland, 42 Cal. 129); Hamersley v. Lambert, 2 Johns. Ch. 509, 510; Hunt v. Rousmaniere, 8 Wheat. 212, 213, 1 Pet. 16; Devaynes v. Noble, 1 Mer. 538, 539; Ex parte Kendall, 17 Ves. 514, 526, 527; Ex parte Ruffin, 6 Ves. 125, 126; Gray v. Chiswell, 9 Ves. 118; Campbell v. Mullett, 2 Swanst. 574, 575; Cowell v. Sikes, 2 Russ. 191; Towers v. Moor, 2 Vern. 98; Simpson v. Vaughan, 2 Atk. 31.

[3] Wilkinson v. Henderson, 1 Mylne & K. 582; Braithwaite v. Britain, 1 Keen. 219; Brown v. Weatherby, 12 Sim. 6, 11; Devaynes v. Noble, 2 Russ. & M. 495; Thorpe v. Jackson, 2 Younge & C. 553, 561, 562; Freeman v. Stewart, 41 Miss. 138. In Indiana it has been held that the Code of Procedure, by abolishing the distinctions between legal and equitable actions, and introducing the equitable doctrines concerning parties, and providing for the severance of the judgment, has, without any special provision on the subject, introduced this equitable rule into the law. In other words, it is settled in that state, upon a just interpretation of the code, that upon the death of one joint or joint and several debtor, a legal action will lie at once against the survivors and the administrators or executors of the deceased as co-defendants: Braxton v. State, 25 Ind. 82; Eaton v. Burns, 31 Ind. 390; Klussmann v. Copeland, 18 Ind. 306; Voris v. State ex rel. Davis, 47 Ind. 345, 349, 350; Myers v. State ex rel. McCray, 47 Ind. 293, 297; Owen v. State, 25 Ind. 371. In Braxton v. State, 25 Ind. 82, the action was against the three survivors and the administrators of the deceased obligors on a bond. After stating that there were no special provisions on the subject in the Indiana code (as there are in some of the states), and after quoting the sections concerning forms of action and parties defendant, Elliott, J., proceeds: "It was manifestly the intention of the legislature, in the adoption of these provisions, to afford as far as possible a simple and direct means of bringing all the parties having an interest in the controversy before the court, and of settling all their rights in a single litigation, and thereby to avoid a multiplicity of suits." The decision in Voorhis v. Child's Ex'rs, 17 N. Y. 354, was expressly disapproved.

law dogma concerning joint debtors has been wholly abrogated. Special provisions of their codes of procedure, or of other statutes, expressly authorize a legal action to be brought in the first instance against the survivors and the personal representatives of the deceased joint debtor, or even against some, any, or one of them, at the option of the creditor who sues.[4] There is one important exception, as established by the courts in England and in many of the United States, to the doctrine that equity will regard and treat a joint obligation arising from contract as joint and several, so as to render the estate of a deceased debtor liable to a suit in equity brought by the creditor; and that is, where the deceased debtor is a surety. It is well settled, "that if the joint obligor so dying be a surety, not liable for the debt irrespective of the joint obligation, his estate is absolutely discharged both at law and in equity, the survivor only being liable. In such case, where the surety owed no debt outside and irrespective of the joint obligation, the contract is the measure and limit of his obligation. He signs a joint contract and incurs a joint liability, and no other. Dying prior to his co-maker, the liability all attaches to the survivor."[5]

In these cases the Indiana court has, in my opinion, interpreted the Code of Procedure in accordance with its true spirit and intent. The same construction has been given to similar sections of the code, and the same rule adopted by the supreme court of California in the very recent case of Bostwick v. McEvoy, 55 Cal. 496.

[4] *Iowa:* Code, § 2550; Sellon v. Braden, 13 Iowa, 365. The Iowa cases cited in the preceding note under this paragraph were decided before the provision referred to was enacted. *Kentucky:* Code, § 39. *Missouri:* Code, art. 1, § 7; 1 Wagner's Stats., p. 269, §§ 1-4. *Kansas:* Gen. Stats. 1868, chap. 21, §§ 1-4. *Ohio:* Swann's Rev. Stats. 378; Burgoyne v. Ohio Life Ins., etc., Co., 5 Ohio St. 586, 587.

[5] Getty v. Binsse, 49 N. Y. 385, 388, 389, 10 Am. Rep. 379; Wood v. Fisk, 63 N. Y. 245, 20 Am. Rep. 528; Pickersgill v. Lahens, 15 Wall. 140; United States v. Price, 9 How. 92; Harrison v. Field, 2 Wash. (Va.) 136; Weaver v. Shryock, 6 Serg. & R. 262, 264, 265; Missouri v. Fank, 51 Mo. 98; Simpson v. Field, 2 Cas. Ch. 22; Sumner v. Powell, 2 Mer. 30, per Sir William Grant, M. R.; affirmed on appeal, 1 Turn. & R. 423, per Lord Eldon; Other v. Iveson, 3 Drew. 177; Richardson v. Horton, 6 Beav. 185; Jones v. Beach, 2 De Gex, M. & G. 886; Wilmer v. Currey, 2 De Gex & S. 347. In some of the states, however, either from the effect of special statutes or from a different view of

§ 410. **Settlement of Insolvent Estates — Marshaling of Assets.**[a]— Another remarkable and most just application of the principle, often leading to results very different from those produced by the operation of legal rules, may be seen in all those instances where a court of equity acquires jurisdiction, from any cause, to wind up, distribute, or settle an estate, property, or fund against which there are a number of separate claimants. One example is that of settling the affairs of an insolvent partnership, corporation, or individual debtor in a creditor's suit brought by one on behalf of all other creditors, where the assets are not sufficient to satisfy all demands in full; the court always proceeds upon the principle that equality is equity, and of apportioning the property *pro rata* among all the creditors.[b] The principle is carried to such an extent in the settlement of insolvent partnerships, and partnerships where one of the members has died, that firm creditors are compelled in the first instance to resort to the firm assets, and creditors of the individual partners to individual assets, before either class can have recourse to any balance left remaining of the other kind of fund. A second example is that of marshaling the assets in the administration of the estates of deceased persons. At the common law certain classes of creditors enjoyed a precedence over others, and were entitled to be paid in full, even to the exclusion of the inferior orders, by the administrator or executor out of

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equity taken by the courts, this exception has not been adopted, and the estate of a deceased joint surety is liable in the same manner as that of any other deceased joint debtor. See Voris v. State, 47 Ind. 345, 349, 350; Myers v. State, 47 Ind. 293, 297.

(a) This paragraph of the text is cited in Blair v. Smith, 114 Ind. 114, 5 Am. St. Rep. 593, 15 N. E. 817, 822, as illustrating the allowance of pecuniary relief in equity.

(b) The text is quoted in In re Lord & Polk Chemical Co., 7 Del. Ch. 248, 44 Atl. 775, holding that the funds of an insolvent corporation in a receiver's hands, in the absence of a statute prescribing a different order, should be distributed to simple contract and judgment creditors alike. "Equity . . . imputes no particular merit to diligence unless the advantage thereby acquired amounts to a lien, or some vested right or interest, which neither equity or law will allow to be disturbed."

the legal assets of the decedent's estate, according to their established priority of right. But a court of equity, having obtained jurisdiction over an administration, regards all debts, in general, as standing upon an equal footing, and as entitled to payment *pro rata* out of the equitable assets, if the estate is not sufficient to pay them all in full, without any reference to their legal right of priority. In order to attain this result, and to carry out the principle of equality is equity in administrations, the doctrine of marshaling assets was established.

§ 411. **Abatement of Legacies; Apportionment of Liens; Appointment under Trust Powers; and Contribution among Co-contractors and Co-sureties.**— Among the other doctrines derived from the principle that equality is equity as their source are the following: The abatement of legacies, whereby a *pro rata* deduction is made from all legacies of the same class when the assets are insufficient to pay all in full. It is true that the principle is not carried out with absolute rigor in the case of legacies, since two different classes are admitted,— the " general " and the " specific," the latter being entitled to priority of payment. But the deduction is applied to all those which belong to the same class, and the leaning is strongly in favor of placing any particular legacy in the " general " class.[a] The apportionment of the money secured by mortgages or other encumbrances among the various owners of the different parcels into which the mortgaged premises have been divided: Whenever a mortgage or other encumbrance has been placed upon a tract of land, and the tract is subsequently conveyed, subject to the mortgage, in parcels to different owners, or liens or other interests in distinct portions of the land are subsequently acquired by different persons, in adjusting the payment of the whole mortgage debt, either voluntarily by way of redemption, or forcibly by way of foreclosure, equity applies, unless some other controlling equitable consideration interfere, the principle of equality;

(a) See *post*, §§ 1135–1143.

in other words, equity makes a *pro rata* apportionment among all the owners of parcels and holders of liens or interests.[b] It should be observed, however, that this particular application of the principle is not universal; for in several of the states, on account of other assumed equitable considerations, a different rule has been adopted. The whole subject is examined in the subsequent chapter on mortgages.[c] The execution of a power in trust when the donee has failed to act under it: A power in trust partakes so much of the nature of an express active trust, that if the donee upon whom it was conferred fails to make any appointment under it, a court of equity will not suffer the power to wholly fail, but will carry it into effect, in accordance with its own principle of equality.[1] Where a power in trust is given to appoint among the members of a designated class, as among " the children " of the donee, and the like, the donee upon whom the power is conferred can appoint in favor of any one of the class, and a court of equity will not interfere with his discretion.[2] Where the donee, however, fails to make any appointment, and of course makes no selection of a particular beneficiary out of the class, a court of equity will carry out the power, under the principle of equality, by dividing the fund subject to the power in equal shares among all the persons composing the designated class.[3] [d] Finally, the most important doctrine, perhaps, which results from the principle, Equality is equity, is that of contribution among joint debtors, co-sureties, co-contractors, and all others upon whom the same pecuniary obligation arising from contract, express or implied, rests. This doctrine is evidently based upon the notion that the burden in all such cases should be equally borne by all the persons upon whom it is imposed, and its necessary effect is to equalize that burden whenever one of the parties has, in pursuance of his mere *legal* liability, paid or been compelled to pay the whole amount, or any amount greater than his proportionate share. No more *just* doctrine is found in the entire range of equity; and although it is now a familiar rule of the *law,* it should not be forgotten that its conception and origin are wholly due to the creative functions of the chancellor.[e]

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[1] Brown v. Higgs, 8 Ves. 570, 5 Ves. 495, 4 Ves. 708; Harding v. Glyn, 1 Atk. 469; Salusbury v. Denton, 3 Kay & J. 529.

[2] See cases last cited, and Willis v. Kymer, L. R. 7 Ch. Div. 183.

[3] Willis v. Kymer, L. R. 7 Ch. Div. 183; Salusbury v. Denton, 3 Kay & J. 529.

(b) The text is cited in Coffin v. Parker, 127 N. Y. 117, 27 N. E. 814.

(c) See *post*, §§ 1221-1226.

(d) See *post*, § 1002, as to powers in trust.

§ 412. **Conclusion.**— The preceding paragraphs give a sufficient illustration of the principle, Equality is equity; and they demonstrate the fact that a court of equity endeavors to carry the maxim into operation in the administration of remedies whenever jurisdiction is for any cause obtained over the subject-matter of a controversy. The various doctrines which I have mentioned as originating from this principle, and the cases selected as examples of its operation, will be fully examined in the subsequent chapters of this work.

SECTION VI.

WHERE THERE ARE EQUAL EQUITIES, THE FIRST IN ORDER OF TIME SHALL PREVAIL.

ANALYSIS.

§ 413. Its application.
§ 414. Its true meaning; opinion in Rice v. Rice.
§ 415. Its effect upon equitable doctrines.

§ 413. **Its Application.**[a]— The "equities" spoken of in this maxim embrace both equitable estates, interests, and primary rights of property, such as the *cestui que trust's* estate in any species of trust, the mortgagee's equitable

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(e) See § 1418. This passage of the text is quoted in Campau v. Detroit Driving Club (Mich.), 98 N. W. 267.

(a) This and the two following paragraphs of the text are cited and quoted in Campbell v. Sidwell, 61 Ohio St. 179, 55 N. E. 609.

interest, equitable liens, the interest of the assignee under an equitable assignment, and the like, and also the purely remedial rights, or rights to some purely equitable remedy, to which the distinctive name " equity " has been given by modern judges and text-writers; such, for example, as the equitable right to a reformation. With respect to " equities " considered in this comprehensive manner, and to many legal interests, the maxim, *Qui prior est tempore, potior est jure,* is of wide and important application both in equity and at law.

§ 414. **Its True Meaning — Rice v. Rice.**— The true meaning and effect of the principle, When there are equal equities, the first in order of time shall prevail, have often been misunderstood; and its correct signification cannot be better explained than by employing the exact language used by a very able English equity judge, in a recent case,[1] as follows: " What is the rule of a court of equity for the determining the preference as between persons having adverse equitable interests? The rule is sometimes expressed in this form, As between persons having only equitable interests, *qui prior est tempore, potior est jure.* This is an incorrect statement of the rule, for that proposition is far from being invariably true. In fact, not only is it not universally true as between persons having only equitable interests. but it is not universally true even where their equitable interests are of precisely the same nature, and in *that respect* precisely equal; as in the common case of two successive assignments for a valuable consideration of a reversionary interest in stock standing in the names of trustees, where the second assignee has given notice [to the trustee] and the first has omitted it.[2] Another form of stating the rule is this, As between persons having only equitable interests, if *their equities are equal, qui prior est tempore, potior est jure.* This form of stating the rule is not so obviously incorrect as the former. And yet, even this enunciation of the rule, when accurately considered, seems to me to involve a contradiction. For when we talk of two persons having equal or unequal equities, in what sense do we use the term 'equity'? For example, when we say that A has a better equity than B, what is meant by that? It means only that according to those principles of right and justice which a court of equity recognizes and acts upon, it will prefer A to B, and will interfere to enforce the rights of A as against B; and therefore it is impossible (strictly speaking) that two persons should have equal equities except in a case in which a court of equity would altogether refuse to lend its assistance to either party as against the other. If the court will interfere to enforce the right of one against the other on any ground whatever, say on the ground of priority of time, how can it be said that the equities of the two are equal? i. e., in other words, how can it be said that the one has no better right to call for the interference of a court of equity than the other? To lay down the rule, therefore, with perfect accuracy, I think it should be stated in some such form as this: As between persons having only equitable interests, if their interests are *in all other respects* equal, priority in time gives the better equity; or, *Qui prior est tempore, potior est jure.* I have made these observations, not, of course, for the purpose of mere verbal criticism on the enunciation of a rule, but in order to ascertain and illustrate the real meaning of the rule itself. And I think the meaning is this: that in a contest between persons having only equitable interests, priority of time is the ground of preference last resorted to; i. e., that a court of equity will not prefer the one to the other on the mere ground of priority of time, until it finds, upon an examination of their relative merits, that there is no other sufficient ground of preference between them, or in other words, that their equities are in all respects equal; and that if the one has on other grounds a better equity than the other, priority of time is immaterial.[a] In examining into the relative merits (or equities) of two parties having adverse equitable interests, the points to which the court must direct its attention are obviously these: the nature and condition of their respective equitable interests, the circumstances and manner of their acquisition, and the whole conduct of each party with respect thereto. And in examining into these points, it must apply the test, not of any technical rule, or any rule of partial application, but the same broad principles of right and justice which a court of equity applies universally in deciding upon contested rights."[3][b]

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[1] Rice v. Rice, 2 Drew. 73. A grantor conveyed land without receiving his purchase-money, but the receipt of it was indorsed on the deed, and the title deeds were delivered to the grantee. Of course a vendor's lien at once arose as security for the unpaid price, which was at least valid between the grantor and the grantee, and was *prior* to any equity thereafter created by the grantee. The grantee afterwards borrowed money, and to secure its payment made an equitable mortgage of the land by a deposit of the title deeds with the creditor. Held, that as between the vendor's lien and the lien of the equitable mortgage, the possession of the title deeds by the grantee, and the receipt of the price indorsed on the deed of conveyance, operated to make the latter lien superior to the former, and thus overcame the effect of priority. The two equities were not equal. In his opinion the vice-chancellor used the language quoted in the text.

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[2] Here the second assignee would obtain priority over the first: See Loveridge v. Cooper, 3 Russ. 30.

[3] I add to the foregoing the following language of another most able equity judge, Lord Westbury, in the celebrated case of Phillips v. Phillips, 4 De Gex, F. & J. 208, 215: "I take it to be a clear proposition that every conveyance of an equitable interest is an innocent conveyance; that is to say, the grant of a person entitled merely in equity passes only that which he is justly entitled to, and no more. If, therefore, a person seised of an equitable estate (the legal estate being outstanding) makes an assurance by way of mortgage, or grants an annuity, and afterwards conveys the whole estate to a purchaser, he can grant to the purchaser that which he has, viz., the estate subject to the mortgage or annuity, and no more. The subsequent grantee takes only that which is left in the grantor. Hence grantees and encumbrancers claiming in equity take and are ranked according to the dates of their securities; and the maxim applies, *Qui prior est tempore, potior est jure.* The first grantee is *potior;* that is, *potentior.* He has a better and superior — because a prior — equity. The first grantee has a right to be paid first, and it is quite immaterial whether the subsequent encumbrancers, at the time when they took their

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(a) The greater portion of this passage is quoted in Campbell v. Sidwell, 61 Ohio St. 179, 55 N. E. 609.

(b) This portion of the opinion in Rice v. Rice is quoted in Dueber Watch-Case Mfg. Co. v. Daugherty, 62 Ohio St. 589, 57 N. E. 455, and in Frost v. Wolf, 77 Tex. 455, 19 Am. St. Rep. 761, 14 S. W. 440; both cases presenting good illustrations of the meaning of "unequal" equities. The text is cited in Himrod v. Gilman, 147 Ill. 293, 35 N. E. 373.

§ 415. **Its Effect.**— It follows from this explanation of the principle that when several successive and conflicting claims upon or interests in the same subject-matter are wholly equitable, and neither is accompanied by the legal estate, which is held by some third person, and neither possesses any special feature or incident which would, according to the settled doctrines of equity, give it a precedence over the others wholly irrespective of the order of time,— under these circumstances the principle applies, and priority of claim is determined by priority of time.[1][a] There are,

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securities and paid their money, had notice of the first encumbrance or not." See also Cory v. Eyre, 1 De Gex, J. & S. 149, 167, per Turner, L. J.; Newton v. Newton, L. R. 6 Eq. 135, 140, 141, per Lord Romilly, M. R.

[1] Brace v. Duchess of Marlborough, 2 P. Wms. 491; Beckett v. Cordley, 1 Brown Ch. 353, 358; Mackreth v. Symmons, 15 Ves. 354; Loveridge v. Cooper, 3 Russ. 30; Peto v. Hammond, 30 Beav. 495; Cory v. Eyre, 1 De Gex, J. & S. 149; Case v. James, 3 De Gex, F. & J. 256; Newton v. Newton, L. R. 6 Eq. 135; Fitzsimmons v. Ogden, 7 Cranch, 2; Berry v. Mutual Ins. Co., 2 Johns. Ch. 603; Muir v. Schenck, 3 Hill, 228, 38 Am. Dec. 633; Cherry v. Monro, 2 Barb. Ch. 618; Van Meter v. McFaddin, 8 B. Mon. 435; Rexford v. Rexford, 7 Lans. 6; Rowan v. State Bank, 45 Vt. 160; Rooney v. Soule, 45 Vt. 303; Tharpe v. Dunlap, 4 Heisk. 674. One or two simple illustrations of this principle may be proper. If a creditor, B, holding a thing in action due from A, should assign the same, for a valuable consideration paid by each, to successive assignees, neither of whom notified the debtor, A, nor the other assignees, as long as such thing in action remained unpaid, the first assignee, as between himself and the debtor, A, on the one side, and the subsequent assignees on the other, would be entitled to compel payment by reason of his priority, since the equities of all the assignees, irrespective of time, would be equal. But if, before receiving notice of any prior assignment, the debtor, A, should be notified of a subsequent assignment, and should pay the claim to that assignee, the one thus paid would thereby obtain a precedence, since, in addition to his equitable claim, he would have obtained the legal title. Again, since in a very large number of the states the interest of a mortgagee of lands is purely equitable, unaccompanied by any legal estate, if in those states an owner of land, A, should give successive mortgages upon it, each for a valuable consideration, such mortgages would be entitled to a priority in the order of time, had not the statutes concerning recording interfered with the operation of this doctrine, and enabled a subsequent mortgagee to obtain a preference by means of the record. The doctrine would still prevail if all the mortgages should be unrecorded. Other illustrations might be given, but these will suffice. It is plain that in this country the statutory system of recording has greatly interfered with the application of the principle in cases where it would operate, in England, to determine the rights of the parties.

(a) The text is quoted in Hurst v. Hurst (Ky.), 76 S. W. 325; Campbell v. Sidwell, 61 Ohio St. 179, 55 N. E. 609.

however, many features and incidents of equitable interests which prevent the operation of this rule, and which give a subsequent equity the precedence over a prior one, as will be fully shown in the next chapter. The principle embodied in this maxim lies at the foundation of the important doctrines concerning priorities, notice, and the rights of purchasers in good faith and for a valuable consideration, which so largely affect the administration of equity jurisprudence in England, though to a less extent in the United States, and which are discussed in the following chapter.[b]

SECTION VII.

WHERE THERE IS EQUAL EQUITY, THE LAW MUST PREVAIL.

ANALYSIS.

§ 416. Its application.
§ 417. Its meaning and effects.

§ 416. **Its Application.**— This maxim and the one examined in the last preceding section must be taken in connection, in order to constitute the enunciation of a complete principle. The first applies to a certain condition of facts; the other supplements its operation by applying to additional facts by which equitable rights and duties may be affected. The two are in fact counterparts of each other,

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(b) The text is quoted in Campbell v. Sidwell, 61 Ohio St. 179, 55 N. E. 609. In this interesting case it was urged that the maxim should be applied in a certain class of cases where, though the equities are admittedly unequal, the usual rules of priority cannot be applied without an apparent absurdity; viz., where lien A is superior to lien B, lien B is superior to lien C, but lien C is superior to lien A — a situation by no means uncommon. In the particular case, lien A was a grantor's lien, lien B that of a judgment against the grantee, lien C that of B's *bona fide* mortgagee. The court held that the maxim should be confined to cases where the liens are equitable and are equal in all respects save time; and, the property being insufficient to pay the mortgage in full, ordered sufficient of the proceeds paid to discharge the judgment, and the rest applied upon the mortgage. The second lien was thus given a priority which it would not have had save for the existence of the third lien.

and taken together, they form the source of the doctrines, in their entire scope, concerning priorities, notice, and purchasers for a valuable consideration and without notice. Any full examination of these two maxims, and explanation of their effects, would, of necessity, be a complete discussion of those doctrines, and will, therefore, not be attempted at present, but will be postponed to a subsequent chapter.[1]

§ 417. **Its Meaning and Effects.**— The meaning of the maxim is, if two persons have equal equitable claims upon or interests in the same subject-matter, or in other words, if each is equally entitled to the protection and aid of a court of equity with respect of his equitable interest, and one of them, in addition to his equity, also obtains the legal estate in the subject-matter, then he who thus has the legal estate will prevail. This precedence of the legal estate might be worked out by the court of equity refusing to interfere at all, and thereby leaving the parties to conduct their controversy in a court of law, where of course the legal estate alone would be recognized.[1] One of the most frequent

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§ 416, [1] See the next chapter, sections on "priorities" and "notice."

§ 417, [1] Thorndike v. Hunt, 3 De Gex & J. 563, 570, 571; Caldwell v. Ball, 1 Term Rep. 214; Fitzsimmons v. Ogden, 7 Cranch, 2, 18; Newton v. McLean, 41 Barb. 285. Thorndike v. Hunt, 3 De Gex & J. 563, 570, 571, is a very instructive case, illustrating this principle; the facts were as follows: A certain person, H., was trustee of two entirely distinct trusts,— one in favor of Thorndike, the other in favor of Browne. In a suit brought by the *cestui que trust*, T., in one of these trusts, the trustee was ordered to transfer moneys, the proceeds of certain trust property in his hands, into court. The transfer was made by him, the money was paid into court and deposited to the credit of T.'s suit, and was treated as belonging to T.'s estate. By operation of the statute, the legal estate in such money thereby became vested in the accountant-general, an officer of the court, for the purposes of the suit. It subsequently was discovered that the trustee, H., had provided himself with money, for the purpose of complying with the order of the court, by fraudulently misappropriating certain funds which he held under the other trust in favor of B. On discovery of this fact, B. brought a second suit for the purpose of reaching such moneys; and the only question was, whether B. could reach the money which had thus been paid into court. The court held that he could not, because, the equities of T. and of B. being otherwise equal, T. had obtained the benefit of the legal title on his side. The reasons given for the decision were as follows: that T. had no notice of the trustee's want of right and title to the money which he paid into court; that the transfer was for a valuable consideration, because there was a debt due from the trustee for which he would and important consequences and applications of this principle is the doctrine, that when a purchaser of property for a valuable consideration, and without notice of a prior equitable right to or interest in the same subject-matter, obtains the legal estate in addition to his equitable claim, he becomes, in general, entitled to a priority both in equity and at law.[2] [a]

SECTION VIII.

EQUITY AIDS THE VIGILANT, NOT THOSE WHO SLUMBER ON THEIR RIGHTS.

ANALYSIS.

§ 418. Its meaning; is a rule controlling the administration of remedies.
§ 419. Its application and effects.

§ 418. Its Meaning; Is a Rule Controlling the Administration of Remedies.— The principle embodied in this maxim, the original form of which is, *Vigilantibus non dormientibus æquitas subvenit,* operates throughout the entire remedial portion of equity jurisprudence, but rather as furnishing a most important rule controlling and restraining the courts in the administration of all kinds of reliefs, than as being the source of any particular and distinctive doctrines of the jurisprudence. Indeed, in some of its applications it may

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have been liable by execution upon his own property, or otherwise, and therefore B.'s equity to follow the money was no higher than T.'s right to retain it, and the fact that the legal title was held for T. by the accountant-general was sufficient to create a preference in T.'s favor.

[2] Basset v. Nosworthy, Cas. t. Finch, 102, 2 Lead. Cas. Eq. 1, and notes; Le Neve v. Le Neve, Amb. 436, 2 Lead. Cas. Eq., 4th Am. ed., 109, and notes; Phillips v. Phillips, 4 De Gex, F. & J. 208; Pilcher v. Rawlins, L. R. 7 Ch. 259; Jerrard v. Saunders, 2 Ves. 454; Wallwyn v. Lee, 9 Ves. 24; Payne v. Compton, 2 Younge & C. 457; Wood v. Mann, 1 Sum. 507; McNeil v. Magee, 5 Mason, 269; Vattier v. Hinde, 7 Pet. 252; Boone v. Chiles, 10 Pet. 177; Rexford v. Rexford, 7 Lans. 6; Rowan v. State Bank, 45 Vt. 160.

(a) The text is cited in Tate v. Security Trust Co., (N. J. Eq.), 52 Atl. 313 (valuable consideration essential element of *bona fide* purchase); Economy Sav. Bank v. Gordon, 90 Md. 486, 45 Atl. 176, 48 L. R. A. 63 (*bona fide* assignee of mortgage protected).

properly be regarded as a special form of the yet more general principle, He who seeks equity must do equity.[1] The principle thus used as a practical rule controlling and restricting the award of reliefs is designed to promote diligence on the part of suitors, to discourage laches by making it a bar to relief, and to prevent the enforcement of stale demands of all kinds, wholly independent of any statutory periods of limitation. It is invoked for this purpose in suits for injunction, suits to obtain remedy against fraud, and in all classes of cases, except perhaps those brought to enforce a trust against an express trustee.[2] [a]

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[1] Thus in applications to restrain by injunction acts authorized by statute, on the ground that they would constitute a nuisance, and in all other similar applications, the rule is well settled that the plaintiff must use diligence in seeking his remedy, and a comparatively short delay may be laches sufficient to defeat his remedial right. With reference to this example of the maxim it was said in Great Western R'y v. Oxford, etc., R'y, 3 De Gex, M. & G. 341, 359, per Turner, L. J.: "The jurisdiction to interfere is purely equitable, and it must be governed by equitable principles. One of the first of those principles is, that parties coming into equity must do equity; and this principle more than reaches to cases of this description. If parties cannot come into equity without submitting to do equity, *a fortiori* they cannot come for the summary interference of the court when their conduct before coming has been such as to prevent equity being done." And see Buxton v. James, 5 De Gex & S. 80, 84; Coles v. Sims, Kay, 56, 70, 5 De Gex, M. & G. 1; Gordon v. Cheltenham R'y, 5 Beav. 229, 237; Fuller v. Melrose, 1 Allen, 166; Tash v. Adams, 10 Cush. 252.

[2] Great Western R'y v. Oxford, etc., R'y, 3 De Gex, M. & G. 341; Attorney-General v. Sheffield Gas Co., 3 De Gex, M. & G. 304; Derbishire v. Home, 3 De Gex, M. & G. 80; Wright v. Vanderplank, 8 De Gex, M. & G. 133; Coles v. Sims, 5 De Gex, M. & G. 1; Kay, 56, 70; Graham v. Birkenhead, etc., R'y, 2 Macn. & G. 146; Buxton v. James, 5 De Gex & S. 80; Cooper v. Hubbuck, 30 Beav. 160; Gordon v. Cheltenham R'y, 5 Beav. 229, 237; Attorney-General v. Eastlake, 11 Hare, 205, 228; Rockdale Canal Co. v. King, 2 Sim., N. S., 78; Wood v. Sutcliffe, 2 Sim., N. S., 163; Senior v. Pawson, L. R. 3 Eq. 330; Attorney-General v. Lunatic Asylum, L. R. 4 Ch. 146; Bankart v. Houghton, 27 Beav. 425, 428; Odlin v. Gove, 41 N. H. 465, 77 Am. Dec. 773; Bassett v. Salisbury Mfg. Co., 47 N. H. 426, 439; Peabody v. Flint, 6 Allen, 52; Fuller v. Melrose, 1 Allen, 166; Tash v. Adams, 10 Cush. 252; Briggs v. Smith, 5

(a) The text is cited in Jackson v. Lynch, 129 Ill. 72, 21 N. E. 580, 22 N. E. 246; Citizens Nat. Bank of Utica v. Judy, 146 Ind. 322, 43 N. E. 259; Eames v. Manley, (Mich.), 80 N. W. 15; McKechnie v. McKechnie, 39 N. Y. Suppl. 402, 3 App. Div. 91; Hensel v. Kegans, (Tex. Civ. App.), 28 S. W. 705. The subject of laches is treated more at length in Pom. Equit. Remedies, Introductory Chapter.

§ 419. **Its Application and Effects.**—The scope and effect of the general principle as a rule for the administration of reliefs irrespective of any statutory limitations was stated by an eminent English chancellor in the following language: "A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, *and reasonable diligence.*" [1] [a] The principle has in fact two aspects, one of them wholly independent of any statutory limitation, and the other with reference to such statute. In the earlier forms of the statute of limitations, the provisions were, in express terms, confined to actions at law; and yet courts of equity, proceeding upon the analogy of these enactments in most suits to enforce equitable titles to real estate and equitable personal claims, applied the statutory periods.[2] [b] In certain kinds of suits, however, es-

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R. I. 213; Grey v. Ohio & Penn. R. R., 1 Grant Cas. 412; Little v. Price, 1 Md. Ch. 182; Binney's Case, 2 Bland, 99; Burden v. Stein, 27 Ala. 104, 62 Am. Dec. 758; Pillow v. Thompson, 20 Tex. 206; Borland v. Thornton, 12 Cal. 440; Phelps v. Peabody, 7 Cal. 50.

[1] Per Lord Camden in Smith v. Clay, 3 Brown Ch. 638; and see also Lacon v. Briggs, 3 Atk. 105 (suit by an executor to recover a debt due his testator, after seventeen years' delay, dismissed); Ellison v. Moffatt, 1 Johns. Ch. 46 (suit for an account of transactions ended twenty-six years before the bill was filed dismissed); Phillips v. Prevost, 4 Johns. Ch. 205 (bill by executor of a judgment creditor to enforce a judgment recovered more than thirty-six years before, against the representatives of the debtor thirty years after his death, dismissed); Germantown, etc., Co. v. Filter, 60 Pa. St. 124, 133, 100 Am. Dec. 546; Preston v. Preston, 95 U. S. 200; Neely's Appeal, 85 Pa. St. 387; Johnson v. Diversey, 82 Ill. 446; Colwell v. Miles, 2 Del. Ch. 110; Paschall v. Hinderer, 28 Ohio St. 568; Barnes v. Taylor, 27 N. J. Eq. 259; In re Butler, 2 Hughes, 247; King v. Wilder, 75 Ill. 275; Hathaway v. Noble, 55 N. H. 508.

[2] Hull v. Russell, 3 Saw. 506; Blanchard v. Williamson, 70 Ill. 647; and see cases cited in the two preceding notes.

(a) The text is cited in Haney v. Legg, 129 Ala. 619, 30 South. 34, 87 Am. St. Rep. 81; Hensel v. Kegans, (Tex. Civ. App.), 28 S. W. 705.

(b) The text is quoted in Moore v. Moore, (Ga.), 30 S. E. 535.

pecially those brought against trustees to enforce express trusts, the analogy of the statute was not followed.[3] [c] The modern forms of these statutes, in the American states, generally declare, in express terms, that the periods of limitation shall apply to all equitable suits as well as to legal actions. This legislation has not, however, abrogated the principle under consideration; all cases not falling within the scope of the statutory limitations would still be controlled by it.

SECTION IX.

EQUITY IMPUTES AN INTENTION TO FULFILL AN OBLIGATION.

ANALYSIS.

§ 420. Its meaning and application.
§§ 421, 422. Is the source of certain equitable doctrines.
§ 421. Performance of covenants.
§ 422. Trust resulting from acts of a trustee.

§ 420. **Its Meaning and Application.**—This principle is the statement of a general presumption upon which a court of equity acts. It means that wherever a duty rests upon an individual, in the absence of all evidence to the contrary, it shall be presumed that he intended to do right, rather than wrong; to act conscientiously, rather than with bad faith; to perform his duty, rather than to violate it. The principle is applied in those cases where a court of equity is called upon to determine whether an equitable estate or interest in certain subject-matter belongs to A, in pursuance of an obligation which rested upon B, although B, in acquiring the subject-matter, has not expressed or indicated in any manner an intention on his part of performing such obligation; that is, he did not acquire the subject-matter for the avowed purpose of fulfilling his duty. Notwithstanding the absence of such avowed intention, a court of equity may proceed upon the presumption that B did intend to perform his duty; may hold that the subject-matter was acquired with that design, and that in consequence of such purpose an equitable estate in it belongs to A.

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[3] Colwell v. Miles, 2 Del. Ch. 110.

(c) The text is cited to this effect in Hutcheson v. Grubbs, 80 Va. 251.

§ 421. **Is the Source of Certain Equitable Doctrines: Performance of Covenants.**— One important application of the principle is in connection with the performance of express covenants. The general rule has therefore been settled, that where a person covenants to do an act, and he afterwards does something which is capable of being considered either a total or partial performance of that act, he will be presumed to have done it with the intention of performing the covenant, although, of course, no such intention was expressed. In the leading case which illustrates this rule a person in marriage articles covenanted to purchase lands of the annual value of two hundred pounds, and to settle them upon his wife for her life, and then upon his first-born son in tail, etc. He purchased lands of greater value, but made no settlement of them, and on his death they descended to his eldest son as heir at law. This son then brought suit against his father's representatives, to compel other lands to the value of two hundred pounds per annum to be purchased with the personal property of the estate, and to be settled upon him in pursuance of the covenant. It was held, however, that the lands which were purchased by the father, and suffered to descend to the son, should be regarded as a satisfaction of the covenant; that a court of equity would act upon the presumption that the purchase was made by the father with the intent of performing the duty laid upon him by his covenant.[1] [a]

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[1] Wilcocks v. Wilcocks, 2 Vern. 558, 2 Lead. Cas. Eq., 4th Am. ed., 833. This rule is applied in the same manner where a person having no real estate covenants *to convey and settle*, and he afterwards purchases, but does not convey nor settle, the purchase will be presumed made with the intent to fulfill, and the lands thus purchased will be treated as subject to the cove-

(a) Sec §§ 578 *et seq.*

§ 422. **Trust Resulting from Acts of a Trustee.**—Another and far more important application of the principle that equity imputes an intention to fulfill an obligation is seen in the following well-settled rule concerning the creation of a resulting trust, under certain circumstances, by the acts of the trustee or other person standing in fiduciary relations: Whenever a trustee or other person in a fiduciary position, acting apparently within the scope of his powers,— that is, having authority, by virtue of his trust or other fiduciary relation, to do what he does do,— purchases land or personal property with trust funds, or funds in his hands impressed with the fiduciary character, and takes the title to such property in his own name, without any declaration of a trust, a trust with respect to such property at once results in favor of the original *cestui que trust* or other beneficiary; the purchaser becomes with respect to such property a trustee. Equity regards such a purchase as made in trust for the person beneficially interested, independently of any imputation of fraud or fraudulent design, because it assumes that the purchaser *intended* to act, and was acting, in pursuance of his fiduciary duty, and not in violation thereof. This doctrine is one of wide operation, and is used by courts of equity with great efficiency in maintaining and protecting the beneficial rights of property. It has been applied to trustees proper, to executors, and administrators, directors and managers of corporations, guardians of infant wards, guardians or committees of lunatics, agents using moneys of their principals, partners using partnership funds, husbands purchasing property with funds belonging to the separate estate of their wives, and to all persons who stand

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nant, and dealt with so as to carry it into effect: Deacon v. Smith, 3 Atk. 323; Wellesley v. Wellesley, 4 Mylne & C. 581. Where the lands thus purchased are of less value than those covenanted to be purchased or to be conveyed and settled, they will be considered as purchased in part performance of the covenant: Lechmere v. Earl of Carlisle, 3 P. Wms. 211; Lechmere v. Lechmere, Cas. t. Talb. 80; Snowden v. Snowden, 1 Brown Ch. 582, 3 P. Wms. 228, note.

in fiduciary relations towards others.[1] [a] In order that this rule may apply, however, it must be made to appear with reasonable certainty that trust or other fiduciary funds were actually used in making the purchase. A court of equity, in order to raise a resulting trust, will not assume, *from the mere fact* that the purchaser had or might have had trust moneys in his hands, that he used them in paying for the property purchased, in the absence of evidence clearly showing such use by him.[2]

SECTION X.

EQUITY WILL NOT SUFFER A WRONG WITHOUT A REMEDY.

ANALYSIS.

§ 423. Its general meaning and effects.
§ 424. Limitations upon it.

§ 423. **Its General Meaning.**— This principle, which is the somewhat restricted application to the equity jurisprudence of the more comprehensive legal maxim, *Ubi jus ibi remedium,*— wherever a legal right has been infringed, a remedy will be given,— is the source of the entire equitable jurisdiction, exclusive, concurrent, and auxiliary. A full treatment of it, including an explanation of its scope and meaning, with its various applications and illustrations, would simply be a restatement of all the doctrines and rules concerning jurisdiction which have already been discussed in the first part of this work. No such unnecessary repetition will be attempted. It is enough that the principle finds its development in the whole body of doctrines and rules which define and regulate the equitable jurisdiction as distinguished from the jurisdiction at law.

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[1] As applied to *trustees:* Deg v. Deg, 2 P. Wms. 414; Lane v. Dighton, Amb. 409; Perry v. Phelips, 4 Ves. 107, 17 Ves. 173; Schlarfer v. Corson, 32 Barb. 510; Ferris v. Van Vechten, 73 N. Y. 113; McLaren v. Brewer, 51 Me. 402; Hancock v. Titus, 33 Miss. 224. *To executors and administrators:* White v. Drew, 42 Me. 561; Stow v. Kimball, 28 Ill. 93; Barker v. Barker, 14 Wis. 131. *To directors or managers of corporations:* Church v. Sterling, 16 Conn. 388. *To guardians:* Johnson v. Dougherty, 4 N. J. Eq. 406; Bancroft v. Cousen, 13 Allen, 50. *To committees of lunatics:* Reid v. Fitch, 11 Barb. 309. *To agents:* Robb's Appeal, 41 Pa. St. 45; Bridenbacker v. Lowell, 32 Barb. 10. *To partners:* Smith v. Burnham, 3 Sum. 435; Oliver v. Piatt, 3 How. 401; Homer v. Homer, 107 Mass. 85; Settembre v. Putnam, 30 Cal. 490; Jenkins v. Frink, 30 Cal. 586, 89 Am. Dec. 134.

[2] Ferris v. Van Vechten, 73 N. Y. 113. This is a very instructive decision, admitting the doctrine as well settled, but showing the necessity of proof clearly showing the appropriation of the fiduciary funds.

(a) See §§ 587, 1049.

§ 424. **Its Limitations.**—There are, however, certain important limitations upon the generality of the maxim which may properly be stated here, although they have all been referred to in the Introductory Chapter, where the nature of equity is described, or in the chapters of Part First, where the doctrines concerning the exclusive and concurrent jurisdiction are explained. The first of these limitations is, that equity cannot interfere to give any remedy, unless the right in question, the invasion of which constitutes the wrong complained of, is one which comes within the scope of *juridical* action, of *juridical* events, rights, and duties. The right must belong to the purview of the municipal law, — must be one which the municipal law, through some of its departments, recognizes, maintains, and protects. Equity does not attempt, any more than the law, to deal with obligations and corresponding rights which are *purely* moral, which properly and exclusively belong to the tribunal of conscience.[1] [a] The second limitation is, that equity does not interfere to remedy any wrong where the right and the remedy, assuming that the right falls within the purview of the municipal law, both completely belong to the domain of the law. In order that the principle may apply, one of three facts must exist, viz., either,— 1. The right itself must be one not recognized as existing by the law; or 2. The right existing at the law, the remedy must be one which the law cannot or does not administer at all; or 3. The right existing at the law, and the remedy being one which the law gives, the remedy *as administered by the law* must be inadequate, incomplete, or uncertain. Of these three alternatives, the first and second denote the exclusive jurisdiction of equity; the third, the concurrent jurisdiction. The third limitation upon the principle is, that it does not apply where a party, whose case would otherwise come within one of the three alternatives above mentioned, has destroyed or lost or waived his right to an equitable remedy by his own act or laches. With these limitations upon its operation, the principle has been developed into the vast range of the equitable jurisdiction, which, considered in its entirety, gives,— 1.

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[1] It is upon this ground that where a right, undoubtedly belonging to the domain of the municipal law, is strictly legal, equity will not interfere *merely* because, under the particular circumstances of any case, *every legal means and instrument of obtaining relief* has been tried and exhausted without avail. It is plain that if equity should interfere in any such case, it could only be on the ground that the party had a *moral* right; that he was *morally* entitled to redress; because on the assumption, the right, being strictly legal, comes within no recognized head of the equitable jurisdiction, and the only

(a) This paragraph of the text is cited in Harrigan v. Gilchrist (Wis.), 99 N. W. 909, 933.

possible reason for interference by a court of equity would be that, the legal remedies proving absolutely fruitless, and the party having no other means of redress, he has a claim upon a court of equity based upon the intrinsic *righteousness* of his demand. To such a purely moral claim equity does not and cannot respond. See Finnegan v. Fernandina, 15 Fla. 379, 21 Am. Rep. 292; Rees v. City of Watertown, 19 Wall. 121; Heine v. Levee Com'rs, 19 Wall. 658. In Rees v. Watertown, 19 Wall. 121, a holder of bonds issued by the city alleged in his bill that he had obtained judgment thereon against the city, and had also obtained a writ of *mandamus* to compel the city officers to raise and apply funds to satisfy the judgment, but had wholly failed of obtaining any redress. He prayed that the taxable property of the citizens, which he claimed was a fund for the payment of municipal debts, might be subjected to the payment of his judgment, and that the marshal might be empowered to seize and sell so much of such property as should be necessary for that purpose. The court refused relief on the ground that the demand was wholly a legal one, and that the proper remedy was by *mandamus*, and the *mere* fact that the *mandamus* had failed under the particular circumstances of this case did not give a court of equity any jurisdiction. The court said a court of equity "cannot assume control over that large class of obligations called *imperfect* obligations, resting upon conscience and moral duty only, unconnected with legal obligations." The decisions in the other cases above cited are to the same effect.

Legal remedies for the violation of legal rights in a more certain, complete, and adequate manner than the law can give; 2. Equitable remedies for the violation of legal rights, which the law has no power to give with its means of procedure;[b] and 3. Remedies, either equitable or legal in their nature or form, for the violation of rights of which the law takes no cognizance,— rights which the law does not recognize as existing, and which it either cannot or does not protect and maintain.

SECTION XI.

EQUITY FOLLOWS THE LAW.

ANALYSIS.

§§ 425, 426. Twofold meaning of the principle.
- **§ 425. *First,* in obeying the law: Heard v. Stamford, per Lord Chancellor Talbot.**
- **§ 426. *Second,* in applying certain legal rules to equitable estates: Cowper v. Cowper, per Sir J. Jekyll, M. R.**
- **§ 427. Operates within very narrow limits.**

§ 425. **Twofold Meaning — First. In Obeying the Law.**— This maxim in its Latin form, *Æquitas sequitur legem,* was frequently quoted by the earlier chancellors before the extent of the equitable jurisdiction had been fully determined, and an importance, even a supreme and controlling efficacy, has been attributed to it by some writers which it does not and never did possess. So far as it can truly be called a general principle, guiding and regulating the action of equity courts, its meaning and effect are now settled within well-defined and narrow limits. As a practical rule, and not a mere verbal theory, it is wholly restrictive in its operation, and its only object is to keep the jurisdiction of equity from overstepping the boundaries

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(b) It has been laid down, as a principle of jurisdiction, that equity will always give a remedy in this class of cases; see Gavin v. Curtin, 171 Ill. 640, 49 N. E. 523, 40 L. R. A. 776.

which have been established by the prior course of adjudication. With this respect the maxim has a double import and operation: *First.* Equity follows the law, in the sense of obeying it, conforming to its general rules and policy, whether contained in the common or in the statute law. This meaning of the principle was very clearly stated by Lord Chancellor Talbot in the following passage: "There are instances, indeed, in which a court of equity gives a remedy, where the law gives none; but where a particular remedy is given by the law, and that remedy bounded and circumscribed by particular rules, it would be very improper for this court to take it up where the law leaves it, and to extend it further than the law allows."[1][a] It should be observed, however, that equity had not, in developing its jurisdiction, invaded the particular doctrine of the common law which was involved in this case; but it had certainly disregarded other rules as positive and well settled, in its previous course of decision.

§ 426. **Secondly. In Applying Legal Rules to Equitable Estates.**— Equity follows the law in the sense of applying to equitable estates and interests some of the same rules by which at common law legal estates and interests of a similar kind are governed. Equity, having by the exercise of its creative power called into existence the system of equitable estates, determined that these estates should partake, *to a certain extent,* of the quality of the corresponding legal estates. Thus a use in fee was held to descend according to the same rules as a legal estate in fee, and the husband was entitled to curtesy in such a use. It should be carefully observed, however, that courts of equity carried out the principle in this its second sense only to a partial and quite limited extent. A careful examination will show, I think, that the only important rules of law adopted by the early chancellors to regulate equitable estates *were those concerning descent and inheritance.*[1] The feudal incidents of legal estates were held not to apply to uses; equitable estates in fee could be conveyed without livery of seisin, and could be devised by will, and were not subject to dower. It is an evident error to say that equitable estates were regulated by all the rules of the law applicable to the corresponding legal estates. This second sense in which the principle is understood was admirably stated in a celebrated opinion of Sir Joseph Jekyll, of which the following is the important passage: "The law is clear, and courts of equity ought to follow it in their judgments concerning titles to equitable estates; otherwise great uncertainty and confusion would ensue. And though proceedings in equity are said to be *secundum discretionem boni viri,* yet when it is asked, *Vir bonus est quis?* the answer is, *Qui consulta patrum, qui leges juraque servat.* And it is said in Rooke's Case[2] that discretion is a science not to act arbitrarily according to men's wills and private affections, so the discretion which is executed here is to be governed by the rules of law and equity, which are not to oppose, but each in its turn to be subservient to, the other. This discretion, in some cases, follows the law implicitly; in others, assists it and advances the remedy; in others again, it relieves against the abuse, or allays the rigor of it; but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this court. That is a discretionary power, which neither this nor any other court, not even the highest, acting in a judicial capacity, is by the constitution intrusted with."[3] Some of the sentences of this often quoted passage must, I think, be accepted only with considerable modification. Taken literally, they certainly contradict a large portion of the established equitable jurisdiction, and of the settled doctrines of the equity jurisprudence. The same twofold import of the principle has also been expressed in the following formulas: 1. Equity is governed by the rules of the law as to *legal* estates, interests, and rights. 2. Equity is regulated by the analogy of such legal interests and rights, and the rules of the law affecting the same, in regard to *equitable* estates, interests, and rights, *where any such analogy clearly subsists.*[4]

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[1] Heard v. Stamford, Cas. t. Talb. 173. In this case the chancellor was asked to disregard a well-settled doctrine of the common law. By the then existing law, if a man married he at once became personally liable for all his wife's antenuptial debts; but this liability ceased upon the wife's death. If the creditor had not recovered judgment at the time the wife died he was remediless, no matter how large a fortune the wife may have brought to and left with her husband. This rule was grossly unjust in both of its branches. Defendant's wife was indebted at the time of the marriage, and brought her husband a large fortune, but died soon after. One of her creditors brought this suit against the husband, urging that he should be held liable in equity, under the circumstances. The chancellor held that he was not liable, and refused to decree against a settled rule of the law.

(a) See Henderson v. Hall, 134 Ala. 455, 32 South. 840; Davis v. Williams, 130 Ala. 530, 30 South. 488, 89 Am. St. Rep. 55, 54 L. R. A. 749; Gamewell Fire Alarm Tel. Co. v. City of Laporte (C. C. A.), 102 Fed. 417. When a contract is void at law for want of power to make it, a court of equity has no jurisdiction to enforce such contract, or in the absence of fraud, accident, or mistake to so modify it as to make it legal, and then enforce it; Hedges v. Dixon County, 150 U. S. 182, 14 Sup. Ct. 71.

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[1] The early chancellors, in dealing with uses and other equitable estates, plainly shrank from interfering with the legal rules of descent and inheritance, which were so dear to the landed proprietors. Yet they held that equitable estates in fee were not subject to dower, although they were to curtesy; perhaps this distinction was not displeasing to the body of landowners.

[2] Rooke's Case, 5 Coke, 99 b.

§ 427. **Operates within Very Narrow Limits.**— The maxim is, in truth, operative only within a very narrow range; to raise it to the position of a general principle would be a palpable error. Throughout the great mass of its jurisprudence, equity, instead of following the law, either ignores or openly disregards and opposes the law. As was shown in that portion of the Introductory Chapter which deals with the nature of equity, one large division of the equity jurisprudence lies completely outside of the law; it is additional to the law; and while it leaves the law concerning the same subject-matter in full force and efficacy, its doctrines and rules are constructed without any reference to the corresponding doctrines and rules of the law. Another division of equity jurisprudence is directly opposed to the law which applies to the same subject-matter; its doctrines and rules are so contrary to those of the law, that when they are put into operation the analogous legal doctrines and rules are displaced and nullified. As these conclusions cannot be questioned, it is plain that the maxim, Equity follows the law, is very partial and limited in its application, and cannot, like all the other maxims discussed in this chapter, be regarded as a general principle.

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[3] Cowper v. Cowper, 2 P. Wms. 720, 752. In this case the court reluctantly adhered to the legal canon of descent which prefers the whole to the half blood, and held that an equitable estate in fee descended to a cousin of the whole blood, instead of to a brother of the half-blood of the deceased owner.

[4] Snell's Equity, 14.

SECTION XII.

EQUITY ACTS IN PERSONAM, AND NOT IN REM.

ANALYSIS.

§ 428. Origin and original meaning of this principle.
§ 429. In what sense equitable remedies do operate *in rem*.
§§ 430, 431. The principle that courts of equity act upon the conscience of a party explained.
§ 431. The same, per Lord Westbury.

§ 428. **Origin and Original Meaning.**— I have already had occasion, while describing the nature of equity and of equitable remedies in a former chapter, to explain the origin of this maxim, and the leading conception which it originally embodied. In the infancy of the court of chancery, while the chancellors were developing their system in the face of a strong opposition, in order to avoid a direct collision with the law and with the judgments of law courts, they adopted the principle that their own remedies and decrees should operate *in personam* upon defendants, and not *in rem.* The meaning of this simply is, that a decree of a court of equity while declaring the equitable estate, interest, or right of the plaintiff to exist, did not operate by its own intrinsic force to vest the plaintiff with the legal estate, interest, or right to which he was pronounced entitled; it was not itself a legal title, nor could it either directly or indirectly transfer the title from the defendant to the plaintiff. A decree of chancery spoke in terms of personal command to the defendant, but its directions could only be carried into effect by his personal act. It declared, for example, that the plaintiff was equitable owner of certain land, the legal title of which was held by the defendant, and ordered the defendant to execute a conveyance of the estate; his own voluntary act was necessary to carry the decree into execution; if he refused to convey, the court could endeavor to compel his obedience by fine and imprisonment. The decree never stood as a title in the place of an actual conveyance by the defendant; nor was it ever carried into effect by any officer acting in the defendant's name. It has also been shown that this original character of equitable remedies and decrees has been greatly modified by statute in the United States. Under this legislation decrees are made to operate of themselves, wherever necessary, as a sufficient title; they either transfer the estate by their own force, without any actual conveyance from the defendant, or they are carried into execution by officers purporting to act in the defendant's name and stead. Side by side with this most important statutory change, the original personal character of the remedies is still left wherever the alteration would be impossible, as, for example, wherever a decree simply restrains the defendant from doing any specified act, and wherever the jurisdiction is exercised with reference to a subject-matter situated beyond the territorial cognizance of the court.[1] [a]

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[1] See Penn v. Lord Baltimore, 1 Ves. Sr. 444, 2 Lead. Cas. Eq., 4th Am. ed., 1806, and notes.

(a) Subject-matter beyond jurisdiction: Schmaltz v. York Mfg. Co., 204 Pa. St. 1, 93 Am. St. Rep. 782, 53 Atl. 522 (citing and discussing many authorities on this point). For a more detailed exposition of the doc-

§ 429. **In What Sense Equitable Remedies do Operate in Rem.**— It has also been shown, when explaining the nature of equitable remedies, that they generally are, in another special sense, essentially *in rem,* and not *in personam.* Equitable remedies very seldom consist of personal judgments, general recoveries payable out of the defendant's assets. The fundamental theory of the remedial action of equity is, that it deals with specific and identified land or chattels, or specific funds, whether consisting of securities and other things in action or of money, and it seeks to determine, declare, and maintain the estates, interests, and rights of the litigant parties in and to such identified lands, chattels, or funds.[a]

§ 430. **Operation of Equity upon the Conscience of a Party.**— There is still a third aspect of the remedial action of equity which should be accurately understood, since it lies at the foundation of much of the dealing of the court of chancery with the legal estates and rights, and especially those conferred by the positive provisions of statutes. I mean the most important principle, that equity acts upon the conscience of a party, imposing upon him a personal obligation of treating his property in a manner very different from that which accompanies and is permitted by his mere legal title. Whenever a legal estate is, by virtue of some positive rule of either the common or statute law, vested in A, but this legal estate in A is of itself a violation of some settled equitable doctrines and rules, so that B is equitably entitled to the property or to some interest in or claim upon it, equity grants its relief, and secures to B his right, not by denying, or disregarding, or annulling, or setting aside A's legal estate, but by admitting its existence, by recognizing it as wholly vested in A, and then by working upon A's conscience, and imposing upon him the duty of holding and

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trine that equity acts *in personam,* and not *in rem,* especially with reference to its effect upon the different kinds of equitable remedies, see *post,* §§ 1317, 1318, and Pom. Eq. Rem.

[a] Cited in Sharon v. Tucker, 144 U. S. 542, 12 Sup. Ct. 720.

using his legal title for B's benefit, so that, in the ordinary language of the courts, he is treated as a trustee for B. One or two familiar examples will illustrate the working of this fundamental principle. A testator has given certain lands to A by a will properly executed; but A procured the devise by wrongful representations made to the testator, and the lands should, by the doctrines of equity, belong to B. The statute of wills, however, is peremptory in its prescribed mode of executing a will; there can be no will without conforming to the statutory requirements. Equity does not attempt to overrule the statute; it admits the validity of the will, and the legal title vested in A, but on account of A's wrongful conduct in procuring the devise to himself, it says that he cannot conscientiously hold and enjoy that legal title for his own benefit, and imposes upon his conscience the obligation to hold the land for B's benefit, as the equitable owner thereof; and then arises the further obligation upon his conscience to perfect and complete B's equitable ownership by a conveyance.[a] In exactly the same manner the equity of a party is worked out in all those cases where the peremptory provisions of the statute of frauds stand in the way of any legal right or claim, as in the specific enforcement of a verbal contract for the sale of land, which has been part performed by the plaintiff. Another illustration of the principle may be seen in the doctrine established by courts of equity concerning the effect of the registry or recording acts. These statutes declare, in general terms, and without any exception, that a subsequent grantee or mortgagee who first puts his deed or mortgage upon record shall thereby acquire the precedence over a prior unrecorded conveyance. Courts of equity have added the rule that if the subsequent party, who thus obtains the legal benefit of a record, has notice, his recorded instrument shall still be subordinate to the prior unrecorded conveyance of which he was charged with notice. In giving this

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(a) See *post*, §§ 919, 1054.

effect to a notice, the courts of equity do not assume to nullify the provisions of the recording act; they admit that a subsequent grantee has, by means of his record, obtained the complete legal title, which cannot be directly set aside nor disturbed; but they say that the notice of the prior conveyance makes it unconscientious for him to hold and enjoy that legal title for his own benefit, and they impose upon his conscience the obligation of holding it for the benefit of the prior unrecorded grantee.[b]

§ 431. This principle which I have attempted to explain and illustrate in the preceding paragraph, and which underlies a very large part of the remedial action of equity, was stated with his usual clearness and accuracy by Lord Westbury in the following passage: "The court of equity has, from a very early period, decided that even an act of Parliament shall not be used as an instrument of fraud; and if in the machinery of perpetrating a fraud an act of Parliament intervenes, the court of equity, it is true, does not set aside the act of Parliament, but it fastens on the individual who gets a title under that act, and imposes upon him a personal obligation, because he applies the act as an instrument for accomplishing a fraud. In this way the court of equity has dealt with the statute of wills and the statute of frauds."[1] Although Lord Westbury here speaks only of a case where the equitable rights of one person arise from the fraud of another who has thereby obtained the legal estate, yet the principle applies, whatever be the grounds and occasion of the equitable interests and claims which are asserted in opposition to the one having the legal title.[2]

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[1] McCormick v. Grogan, L. R. 4 H. L. 82, 97. This case was concerning a devise which had been obtained by fraud.

[2] In the very recent case of Greaves v. Tofield, L. R. 14 Ch. Div. 563, 577, which arose upon the effect of a recording act, and of actual notice to a subsequent encumbrancer who obtained the first registry, Bramwell, L. J., stated the principle as follows: "I understand the authorities to have established this beyond dispute, that if a man having an estate agrees to sell

(b) See §§ 659–665.

it, or undertakes to grant an interest in it, or a charge upon it, for a valuable consideration, and afterwards, disregarding the bargain he has made, conveys to a third person, or so deals with it by bargain with a third person that he is incompetent to convey the estate or grant the interest to the first which he had agreed to do, and the third person has all along had notice of the first contract, the conscience of the second purchaser is affected, and he cannot retain the estate without giving the person who entered into the first contract that right in it for which he had stipulated, and if necessary, he must join in a conveyance of the estate, if the first person was a purchaser, or he must join in executing a charge, if it was a charge that was to be executed, or a lease, if it was a lease to be granted. I understand the authorities further to establish this, that that principle is not affected by those acts of Parliament which require registration in order to give or to prevent a priority, but that the conscience of the second purchaser, as I have called him, is equally affected, and that the intention of the legislature in such acts as those I have referred to was to afford a protection to persons whose consciences were not affected, and not to give the second purchaser whose conscience was affected an opportunity of joining in the commission of that which was a breach of contract and a wrong to the first person who made the bargain." This is a clear statement of the principle, and one would have supposed that the very statement would have carried conviction of its essential justice. But the observations added by Mr. Justice Bramwell, in which he expresses a strong dissent from this principle, and condemns other familiar principles of equity which have been so long and so firmly established that they may be regarded as the foundations of its jurisprudence, show very clearly the danger to be apprehended from associating purely law judges in the administration of equity. His criticisms are trivial, and his reasoning is weak, but even such criticism and reasoning coming from the bench may, in time, undermine the whole system of equity. The danger was pointed out at the time when the judicature act was passed in England; it has been realized in some of the states of our own country, where equity and law have been combined, in which, beyond a doubt, equity, as a system, is being supplanted by the law as administered from the bench.

CHAPTER II.

CERTAIN DISTINCTIVE DOCTRINES OF EQUITY JURISPRUDENCE.

SECTION I.

CONCERNING PENALTIES AND FORFEITURES.

ANALYSIS.

§ 432. Questions stated.
§§ 433–447. Penalties; equitable relief against.
  § 433. General ground and mode of interference.
  § 434. Form of relief; when given at law.
§§ 435, 436. What are penalties.
  § 436. To secure the payment of money alone.
§§ 437–445. Stipulations not penalties.
  § 437. Stipulations in the alternative.
  § 438. Ditto, for the reduction of an *existing* debt upon prompt payment.
  § 439. Ditto, for accelerating payment of an existing debt.
§§ 440–445. Ditto, for "liquidated damages."
  § 440. "Liquidated damages" described in general.
§§ 441–445. Rules determining between liquidated damages and penalties.
  § 441. 1. Payment of a smaller sum secured by a larger.
  § 442. 2. Agreement for the performance or non-performance of a single act.
  § 443. 3. Agreement for the performance or non-performance of several acts of different degrees of importance.
  § 444. 4. The party liable in the same amount for a partial and for a complete default.
  § 445. 5. Stipulation to pay a fixed sum on default in one of several acts.
  § 446. Specific performance of a contract enforced, although a penalty is attached; party cannot elect to pay the penalty and not perform.
  § 447. Otherwise as to stipulation for liquidated damages.
§§ 448–460. Of forfeitures.
§§ 449–458. When equity will relieve against forfeitures.
  § 450. General ground and extent of such relief.
  § 451. Relief when forfeiture is occasioned by accident, fraud, mistake, surprise, or ignorance.
  § 452. No relief when forfeiture is occasioned by negligence, or is willful.

§§ 453, 454. Relief against forfeitures arising from covenants in leases.
§ 455. Ditto, from contracts for the sale of lands.
§ 456. Ditto, from other special contracts.
§ 457. Ditto, of shares of stock for non-payment of calls.
§ 458. Ditto, when created by statute.
§§ 459, 460. Equity will not enforce a forfeiture.

§ 432. **Questions Stated.**—In this chapter I purpose to discuss certain peculiarly equitable doctrines which, to a greater or less extent, run through and affect the entire system of equity jurisprudence. As neither of them is confined in its operation to any single equitable estate or interest, nor to any one equitable remedy, it seems expedient, in order to avoid unnecessary repetitions, that they should be treated of in a preliminary division by themselves. Each of them may be, and is, applied to several different equitable estates or interests, and may be carried into effect by means of several different equitable remedies; and they may all, therefore, be considered as general, although not perhaps universal. Furthermore, all these doctrines are distinctively equitable in their nature; they are peculiar to the equity system of jurisprudence, and, so far as they go, serve to distinguish it from the law. The particular doctrines which will be treated of in the sections of this chapter are those concerning penalties and forfeitures, election, satisfaction, priorities, notice, performance, and the like. In the present section I shall examine the doctrine concerning penalties and forfeitures, and shall treat, in order, first, of penalties, and second, of forfeitures.

§ 433. **Penalties — Ground and Mode of Interference.**[a]— The true ground of equitable interposition and relief in cases of penalties and forfeitures which might be enforced at law was stated by Lord Macclesfield, in the leading case of Peachy v. Duke of Somerset, to be "*from the original intent of the case, and the court can give a party, by way of recom-*

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[a] Cited with approval in Noyes v. Anderson, 124 N. Y. 175, 26 N. E. 316, 21 Am. St. Rep. 657; Gay Mfg. Co. v. Camp, 65 Fed. 794, 13 C. C. A. 137, 25 U. S. App. 134; Lake View M. & M. Co. v. Hannon, 93 Ala. 87, 9 South. 539.

pense, all that he expected or desired." He confined the interference of equity, however, to those cases in which the penalty is intended only to secure the payment of money.[1] The doctrine was soon extended, so that it embraces cases where the penalty is used not merely to secure a money payment, but as a security for the performance of some collateral act.[2] In its most general scope and operation the doctrine may be stated as follows: Wherever a penalty or a forfeiture is used merely to secure the payment of a debt, or the performance of some act, or the enjoyment of some right or benefit, equity, considering the payment, or performance, or enjoyment to be the real thing intended by the agreement, and the penalty or forfeiture to be only an accessory, will relieve against such penalty or forfeiture by awarding compensation instead thereof, proportionate to the damages actually resulting from the non-payment, or non-performance, or non-enjoyment, according to the stipulations of the agreement. The test which determines whether equity will or will not interfere in such cases is the fact whether compensation can or cannot be adequately made for a breach of the obligation which is thus secured. If the penalty is to secure the mere payment of money, compensation can always be made, and a court of equity will relieve the debtor party upon his paying the principal and interest. If it be to secure the performance of some collateral act, and compensation for a non-performance can be made, a court of equity will ascertain the amount of damages, and relieve upon their payment.[3] It is a familiar doctrine, therefore, that if the penalty is inserted to secure the payment of a pecuniary obligation, relief against it will be granted to the debtor upon his payment of the real amount due and secured, together with interest and costs, if any have accrued.[4] Where the penalty is to secure the performance of some collateral act or undertaking, equity will interpose, if adequate compensation can be made to the creditor party. The original practice in such cases was for the court of equity to retain the bill, direct an issue to ascertain the amount of damages, and to grant relief upon payment of the damages thus assessed by the jury.[5] By the more modern practice the court of equity would doubtless determine the amount of damages itself, without the intervention of a jury.

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[1] Peachy v. Duke of Somerset, 1 Strange, 447.

[2] Sloman v. Walter, 1 Brown Ch. 418, per Lord Thurlow. The doctrine of equitable interference to relieve against penalties and forfeitures has been described and discussed by some writers as a branch of the jurisdiction in cases of accident. In very ancient times, when the powers of the court of chancery were restricted by the language of the royal decree to certain specified heads, as good faith, conscience, fraud, mistake, and accident, and it was necessary that every new exercise of power should be referred to some one of these heads, it may have been claimed that the jurisdiction over penalties belonged to the head of accident. But it is evident that this is not the true source of the jurisdiction; there can be no pretense of any accident in the execution of agreements containing penalties. The doctrine has a deeper foundation in universal principles of right, as shown in the preceding chapter, section II.

§ 434. **Form of Relief.**[a]— While the two jurisdictions at law and in equity were kept distinct, although perhaps given to the same tribunal, the form of the remedy in which relief was obtained against a penalty was that of a suit brought by the debtor party to procure the agreement to be surrendered up and canceled, or the forfeiture perhaps to be set aside, upon payment of the debt or damages; and this decree would often be accompanied by an injunction restraining an action at law upon the agreement brought or threatened by the creditor party. Under the modern legislation, and especially under the reformed procedure, the rights of the debtor party would be protected, and the relief obtained, without any separate suit in equity, but by an equitable defense set up in the action at law by which the creditor sought to enforce the literal terms of the agreement. It has, however, become unnecessary, in many instances, to invoke the purely equitable jurisdiction in order to avoid penalties. The equitable doctrine, as above described, has to a considerable extent been incorporated into the law, partly as the result of statute, and partly from the gradual development of equitable principles in the common law. Whatever be the true explanation, the rule is now very general, even if not universal, that a recovery in actions at law upon contracts which contain an express stipulation for a penalty is limited to the actual debt due, or the actual damages sustained.[1] The law courts have not, however, gone to the same length in adopting the equitable principle in cases of forfeiture.

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[3] 2 Lead. Cas. Eq. 4th Am. ed., 2014, 2023, 2044, and notes; Reynolds v. Pitt, 19 Ves. 140, and cases cited in the two following notes; Bowser v. Colby, 1 Hare, 128; Gregory v. Wilson, 9 Hare, 683; Bracebridge v. Buckley, 2 Price, 200; Nokes v. Gibbon, 3 Drew. 681; Bargent v. Thomson, 4 Giff. 473; Hagar v. Buck, 44 Vt. 285, 8 Am. Rep. 368; Hancock v. Carlton, 6 Gray, 39; Thompson v. Whipple, 5 R. I. 144; Walker v. Wheeler, 2 Conn. 299; Michigan St. Bank v. Hammond, 1 Doug. (Mich.) 527; Giles v. Austin, 38 N. Y. Sup. Ct. 215; 62 N. Y. 486.

[4] Elliott v. Turner, 13 Sim. 477; In re Dagenham Dock Co., L. R. 8 Ch. 1022; Skinner v. Dayton, 2 Johns. Ch. 535, 17 Johns. 357; Deforest v. Bates, 1 Edw. Ch. 394; Giles v. Austin, 38 N. Y. Sup. Ct. 215; Bowen v. Bowen, 20 Conn. 126; Carpenter v. Westcott, 4 R. I. 225; Walling v. Aiken, 1 McMull. Eq. 1; Moore v. Platte, 8 Mo. 467; Bright v. Rowland, 3 How. (Miss.) 398.

[5] Hardy v. Martin, 1 Brown Ch. 419, note; 1 Cox, 26; Benson v. Gibson, 3 Atk. 395; Errington v. Arnesly, 2 Brown Ch. 341, 343; Skinner v. Dayton, 2 Johns. Ch. 534, 535; Bowen v. Bowen, 20 Conn. 127; Gould v. Bugbee, 6 Gray, 371, 375; Hagar v. Buck, 44 Vt. 285, 8 Am. Rep. 368; Pittsburgh R. R. v. Mt. Pleasant R. R., 76 Pa. St. 481, 490; Hackett v. Alcock, 1 Call, 463.

(a) Cited in Lake View M. & M. Co. v. Hannon, 93 Ala. 97, 9 South. 539.

§ 435. **Penalties Defined.**— Such being the general doctrine, the important and practical inquiry in the vast majority of cases is, What are the distinctive features of a penalty? or, What kind of stipulation or provision in an agreement amounts to a penalty, so that it may come within the scope of the equitable doctrine? When the stipulation is intended to secure merely the payment of money, the test is easy and plain, and well established. When it is designed to secure the performance of some collateral act, the question is much more difficult to answer, and involves a statement of the differences between penalties and provisions for the payment of "liquidated damages." The question what is and what is not a penalty I now proceed to examine.

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[1] In most of the states the judgment at law is limited to the amount of debt or damages actually due or sustained; in a few, however, the judgment is formally entered for the whole sum mentioned in the penalty, but with a provision that it is to be satisfied by a payment of the actual debt or damages.

§ 436. **To Secure the Payment of Money Alone.**— Where the act secured to be done is merely the payment of money, the test is simple and well established. It may be regarded as a rule of universal application, that if a party for any reason is liable to pay, or binds himself to pay, a certain sum of money, and adds a stipulation to the effect that in case such sum shall not be paid at the time agreed upon he shall then be liable to pay, or become bound to pay, *a larger sum of money,* the stipulation to pay the larger sum is invariably and necessarily a penalty. Of course, in this proposition it is understood that the "larger sum" is not simply the lawful interest accruing upon the principal actually due. The same doctrine may be stated in more comprehensive terms, in the language of one of the most able of modern English chancellors: "The law is perfectly clear that where there is a debt actually due,[1] and in respect of that debt a security is given, be it by way of mortgage, or be it by way of stipulation, that in case of its not being paid at the time appointed, *a larger sum shall become payable and be paid,*— in either of these cases equity regards the security that has been given as a mere pledge for the debt, and it will not allow either a forfeiture of the property pledged or any augmentation of the debt as a penal provision, on the ground that equity regards the contemplated forfeiture which might take place at law with reference to the estates as in the nature of a penal provision against which equity will relieve when the object in view, viz., the securing of the debt, is attained, and regarding also the stipulation for the payment of a larger sum of money if the sum be not paid at the time it is due, as a penalty and a forfeiture against which equity will relieve."[2] The criterion here given, for all cases where the mere payment of a pecuniary obligation is intended to be secured, applies, it will be observed, alike to a penalty and to a forfeiture. If the additional stipulation involves a liability for a larger sum of money only, it is a penalty; if it involves the loss of lands, chattels, or securities pledged, it is a forfeiture. The same test, in substance, determines the nature of the provision by which the performance of some collateral act is secured. If the act thus secured be single, and the compensatory damages justly resulting from its non-performance can be ascertained with reasonable certainty, and the stipulation binds the debtor party to pay a fixed sum larger than such amount of damages, then the stipulation is a penalty.[3]

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[1] It should be observed by the student that the word "due" is used here in its legal meaning, of something agreed *to be paid,* and not in its popular sense, of something already payable.

§ 437. **Stipulations not Penalties — Alternative Stipulations.** — Such being the general test by which to determine the nature of a penalty, there are certain kinds of stipulations not unfrequently inserted in agreements which have been judicially interpreted and held not to be penalties, and therefore not subject to be relieved against by courts of equity. The nature and effect of these stipulations I shall briefly explain. The first instance is that of a contract by the terms of which the contracting party so binds himself that he is entitled to perform either one of *two* alternative stipulations, at his option; and if he elects to perform one of these alternatives, he promises to pay a certain sum of money, but if he elects to perform the other alternative, then he binds himself to pay a larger sum of money. To state the substance of the agreement in briefer terms, the contracting party may do either of two things, but is to pay

[2] Thompson v. Hudson, L. R. 4 H. L. Cas. 1, 15, per Hatherley, L. C.

[3] See *post*, §§ 440–445, where this subject is more fully examined, under the head of "liquidated damages."

higher for one alternative than for the other. In such a case equity regards the stipulation for a larger payment, not as a penalty, but as liquidated damages agreed upon by the parties. It will not relieve the contracting party from the payment of the larger sum, upon his performance of the latter alternative to which such payment is annexed; nor, on the other hand, will it deprive him of his election by compelling him to abstain from performing whichever alternative he may choose to adopt.[1] [a]

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[1] French v. Macale, 2 Dru. & War. 274; Parfitt v. Chambre, L. R. 15 Eq. 36; Herbert v. Salisbury, etc., R'y, L. R. 2 Eq. 221; Hardy v. Martin, 1 Cox, 27. The leading case in which the doctrine of the text was sustained is French v. Macale, 2 Dru. & War. 274. Lord St. Leonards states the law therein as follows: "If a man covenant to abstain from doing a certain act, and agree that if he do it he will pay a sum of money, it would seem that he will be compelled to abstain from doing that act; and just as in the converse case, he cannot elect to break his engagement by paying for his violation of the contract. . . . The question for the court to ascertain is, whether the party is restricted by covenant from doing the particular act, although if he do it, a payment is reserved; or whether, according to the true construction of the contract, its meaning is, that the one party shall have a right to do the act, on payment of what is agreed upon as an equivalent. If a man let meadow-land at two guineas an acre, and the contract is, that if the tenant choose to employ it in tillage he may do so, paying an additional rent of three guineas an acre, no doubt this is a perfectly good and unobjectionable contract; the plowing up the land is not inconsistent with the contract which provides that in case the act is done the landlord is to receive an increased rent." Parfitt v. Chambre, L. R. 15 Eq. 36, is also a very strong case. An award of arbitrators (which was, of course, binding as a contract) directed that defendant should pay to plaintiff for her life an annuity of twelve hundred pounds a year; and that in order to secure the annuity, defendant should within two months purchase, on behalf of plaintiff, a government annuity of twelve hundred pounds a year; and that if the annuity should not be thus purchased within the two months, then, in addition to the annuity, a further sum of one hundred pounds should become due and payable by defendant to plaintiff on the last day of the second month, and a like sum of one hundred

(a) Thus, in Smith v. Bergengren, 153 Mass. 236, 26 N. E. 690, 10 L. R. A. 768, the defendant covenanted never to practice his profession in a certain town so long as plaintiff should be in practice there, provided, however, that he should have the right to do so at any time after five years by paying the plaintiff $2,000, but not otherwise. The court held this to be neither liquidated damages nor a penalty, but a price fixed for what the contract permitted him to do. See also Taylor v. Smith, 24 App. Div. 519, 49 N. Y. Supp. 41.

§ 438. **For the Reduction of an Existing Debt upon Prompt Payment.**— The second instance is that of an agreement in substance for the reduction of an existing debt, on condition of prompt payment by the debtor. A stipulation reserving to a creditor the right to have full payment of the money due on an existing contract, in case there should be a failure to pay a smaller sum on a specified day, is not a penalty. Wherever, therefore, a certain sum of money is actually due, either from a present advance or from any other cause, and the creditor enters into an agreement with his debtor to take a lesser sum in satisfaction, provided that lesser sum is secured in a specified manner and paid at a specified day,

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pounds on the last day of each successive month, until such annuity should be purchased. The award added: "These monthly payments are to be considered as additional to the payments due in respect of the annuity, and as a penalty for delay in the purchase and securing of the same." The defendant never purchased any annuity. This suit is brought to recover six hundred pounds, one half-year's installment due of the annuity, and also seven hundred pounds for seven monthly payments unpaid of the one hundred pounds additional. The counsel for the plaintiff claimed (p. 38) that the contract was one in the alternative, either to purchase and settle an annuity *or* to pay an annuity plus one hundred pounds a month, until purchase and settlement. The defendant's counsel claimed that the provision for the one hundred pounds per month was only a penalty, and would not be enforced, and that plaintiff was only entitled to recover the six hundred pounds, with nominal damages for the delay. Bacon, V. C., held (pp. 39, 40) that the use of the word "penalty," in the contract, was not decisive; and after repeating the substance of the contract as above, said: "Whenever the defendant saw fit he might have relieved himself from the obligation of that payment [the one hundred pounds a month] by performing the other branch of the contract, namely, the purchase of a government annuity. Nothing can be clearer and plainer. 'Penalty' it is, but penalty in order to secure the performance of the other branch of the contract, with perfect power and liberty for the person upon whom the burden is cast to relieve himself from the penalty or additional payment whenever he shall think fit. That is not a penalty which courts of common law or courts of equity can allow to be relinquished or satisfied, except upon the terms of performing that very thing which the introduction of the penalty imposes in order to effectuate it." In Hardy v. Martin, 1 Cox, 27, Lord Rosslyn, speaking of such an alternative contract as is described in the text, said: "It was the demise of land to a lessee, to do with it as he thought proper; but if he used it in one way he was to pay one rent; and if in another, another; that is a different case from an agreement not to do a thing, with a penalty for doing it." To the same general effect is Herbert v. Salisbury, etc., R'y, L. R. 2 Eq. 221, 224, 225, per Lord Romilly, M. R.

but if any of the stipulations of the agreement are not performed by the debtor according to the terms thereof, then the creditor shall be entitled to be paid and to recover the whole of the original debt, such provision for a return by the creditor to his original rights does not constitute a penalty, and equity will not interfere to prevent its enforcement.[1] [a]

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[1] Thompson v. Hudson, L. R. 4 H. L. 1; reversing L. R. 2 Eq. 612; L. R. 2 Ch. 255. The agreement in this case was the same as described in the text; a certain sum was due, and the creditor agreed to take a less sum in satisfaction if it was secured by mortgage in a specified manner and was paid on a specified day; otherwise the original sum was to become due. The mortgage for the lesser sum was given, but was not paid. The master of rolls, Lord Romilly, held the provision a penalty, and that the creditor could only recover the smaller sum. This decision was affirmed on appeal by a divided court, Lord Chancellor Chelmsford agreeing with the view taken by the master of rolls, and Lord Justice Turner dissenting. On appeal to the house of lords, the decisions below were reversed, and the provision was declared not to be a penalty, but a contract binding in equity as well as at law. Lord Chancellor Hatherley, after the passage quoted in the note under the preceding paragraph, proceeded as follows: "It is equally clear, upon the other hand, that where there is a debt due, and an agreement is entered into at the time of that debt having become due, and not being paid, in regard to further indulgence to be conceded to the debtor, or further time to be accorded to him for the payment of the debt, or in regard to his paying it immediately, if that be a portion of the stipulations of the agreement, or at some future time which may be named, and the creditor is willing to allow him certain advantages and deductions from that debt, as well as to extend the time of its payment, if adequate and satisfactory security is afforded him as a consideration, then it is perfectly competent to the creditor to say that if the payment is not made *modo et forma* according to the stipulation, the right to the original debt reverts." Lord Westbury, in the same case, said (p. 27): "It is right and rational for a creditor to say to his debtor, 'Provided you pay me half of the debt or two thirds of the debt on an appointed day, I will release you from the rest, and will accept the money so paid in discharge of the whole debt; but if you do not make payment of it on that day, then the whole debt shall remain due to me, and I shall be at liberty to recover it;' and this is the view which a court of equity will adopt. . . . If you were to put that proposition to any plain man walking the streets of London, there could be no doubt at all that he would say that it is reasonable, and accordant with common sense. But if he was told that it was requisite to go to those tribunals before

(a) See also U. S. Mortgage Co. v. Sperry, 138 U. S. 313, 11 Sup. Ct. 321; Walsh v. Curtis (Minn.), 76 N. W. 52 (section 430 of the text is cited in this case, but the rule as laid down is a paraphrase of this section of the text).

§ 439. **For Acceleration of Payment of an Existing Debt.**— The third instance of what is not a penalty is that of a contract, not that the amount of a debt should be increased, but that in a specified event the time for the payment of a certain sum due shall be accelerated. It is therefore settled by the overwhelming weight of authority that if a certain sum is due and secured by a bond, or bond and mortgage, or other form of obligation, and is made payable at some future day specified, with interest thereon made payable during the interval at fixed times, annually, or semi-annually, or monthly, and a further stipulation provides that in case default should occur in the prompt payment of any such portion of interest at the time agreed upon, then the entire principal sum of the debt should at once become payable, and payment thereof could be enforced by the creditor, such a stipulation is not in the nature of a penalty, but will be sustained in equity as well as at law. In exactly the same manner, if a certain sum is due and is secured by any form of instrument, and is made payable in specified installments, with interest, at fixed successive days in the future, and a further stipulation provides that in case of a default in the prompt payment of any such installment in whole or in part at the time prescribed therefor, then the whole principal sum of the debt should at once become payable, and payment thereof could be enforced by the creditor, such stipulation has nothing in common with a penalty, and is as valid and operative in equity as at the law.[1] [a] The stipulation

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you could get that plain principle and conclusion of common sense accepted as law, he would undoubtedly hold up his hands with astonishment at the state of the law." See also Ford v. Lord Chesterfield, 19 Beav. 428; Davis v. Thomas, 1 Russ. & M. 506; Ex parte Bennet, 2 Atk. 527; Herbert v. Salisbury, etc., R'y, L. R. 2 Eq. 221, 224, per Lord Romilly; and see cases cited under the next paragraph.

[1] Sterne v. Beck, 1 De Gex, J. & S. 595, 11 Week. Rep. 791; Stanhope v. Manners, 2 Eden, 197; People v. Superior Court of New York, 19 Wend.

(a) Cited with approval in Moore v. Sargent, 112 Ind. 484, 14 N. E. 466; Connecticut Mut. Life Ins. Co. v. Westerhoff, 58 Neb. 379, 78 N. W. 724, 76 Am. St. Rep. 101; Curran v. Houston, 201 Ill. 442, 66 N. E. 228.

is sometimes to the effect that if a default in payment continues for a specified number of days, and sometimes that the creditor may elect to treat the whole debt as payable; but the same rule applies to all such forms. The provision for accelerating the time of payment of the whole debt in this manner may, of course, be waived by the cred-

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104; Noyes v. Clark, 7 Paige, 179, 32 Am. Dec. 620; Ferris v. Ferris, 28 Barb. 29; Baldwin v. Van Vorst, 10 N. J. Eq. 577; Martin v. Melville, 11 N. J. Eq. 222; Robinson v. Loomis, 51 Pa. St. 78; Schooley v. Romain, 31 Md. 574, 579, 100 Am. Dec. 87; Ottawa Plank Road Co. v. Murray, 15 Ill. 337; Basse v. Gallegger, 7 Wis. 442, 76 Am. Dec. 225; Marine Bank v. International Bank, 9 Wis. 57, 68; Berrinkott v. Traphagen, 39 Wis. 219; Bennett v. Stevenson, 53 N. Y. 508; Malcolm v. Allen, 49 N. Y. 448; Mallory v. West Shore, etc., R. R., 35 N. Y. Sup. Ct. 175; Willis v. O'Brien, 35 N. Y. Sup. Ct. 536; Gulden v. O'Byrne, 7 Phila. 93; Mobray v. Leckie, 42 Md. 474; Wilcox v. Allen, 36 Mich. 160; Harper v. Ely, 56 Ill. 179; Meyer v. Graeber, 19 Kan. 165; Pope v. Hooper, 6 Neb. 178; Howell v. Western R. R., 94 U. S. 463. In Malcolm v. Allen, 49 N. Y. 448, the doctrine was carried to its utmost possible length. The mortgage provided that upon non-payment of interest for thirty days after it became due, the mortgagee might elect to treat the whole principal sum as due. An installment and interest fell due and were not paid. Before the thirty days were ended in which to make his election, the mortgagee commenced a foreclosure suit based only upon the installment and interest then due and payable. The thirty days having expired while this suit was pending, and the installment and interest not having been paid, the mortgagee elected to treat the whole as due; the court held that, having thus made his election, he could not be compelled to accept the installment and interest and waive the stipulation; also, that he did not estop himself from enforcing the stipulation by commencing the suit before the thirty days had expired, in order to foreclose merely for the installment and interest then becoming payable, nor even by *receiving payment of the installment of principal* after the thirty days had ended. In Howell v. Western R. R., 94 U. S. 463, it was held that where a railroad company was authorized by statute to issue its bonds which should not mature for thirty years, to be secured by a mortgage of its property, a provision in the mortgage, that on default in the payment of any interest coupon the whole principal sum mentioned in the bond should become payable, was void, as being contrary to the statutory authority. But the mortgage was

See also Magnusson v. Williams, 111 Ill. 450; Hoodless v. Reid, 112 Ill. 105; Whitcher v. Webb, 44 Cal. 127. In Whelan v. Reilly, 61 Mo. 565, a deed of trust provided that the whole amount should become due upon default in payment of interest. Default was made and the trustee advertised a sale. The debtor tendered the amount of interest together with costs before the sale, but the trustee refused to receive it unless the amount of the principal was paid, and proceeded with the sale. The court held that under these circumstances the sale should be set aside.

itor, especially when it is made to depend upon his election.[2][b] It seems also that a court of equity may relieve against the effect of such provision, where the default of the debtor is the result of accident or mistake, and *a fortiori* when it is procured by the fraud or other inequitable conduct of the creditor himself.[3][c]

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held otherwise valid. Notwithstanding this array of authority, a few of the earlier cases pronounced such a provision in a bond or mortgage to be a penalty, and therefore contrary to the well-settled doctrine of equity jurisprudence. See Mayo v. Judah, 5 Munf. 495. It has also been held in at least one case that where a certain sum is due and payable by installments, *without interest,* a stipulation, that upon default in the prompt payment of any installment the whole principal shall at once become payable, is, in effect, a penalty, or rather a forfeiture of the interest which the debtor would be entitled to have discounted or rebated upon his payment of the debt before it was due and payable, and therefore such a stipulation should be relieved against by a court of equity: Tiernan v. Hinman, 16 Ill. 400. I will add that in Sterne v. Beck, 1 De Gex, J. & S. 595, 600, 601, the lords justices, while laying down the rule which they approve, state, apparently with great care, that the debt is payable in installments, with interest; and this expression is repeated by them on every occasion when the terms of the agreement to which the rule applies are mentioned. It is hardly possible to avoid the inference that they regarded the payment of interest with the installments as an important element of the rule which they adopt.

[2] Langridge v. Payne, 2 Johns. & H. 423.

[3] In Martin v. Mellville, 11 N. J. Eq. 222, it was held that equity may relieve where the default of the debtor in such a case is the result of accident or mistake; and in Wilcox v. Allen, 36 Mich. 160, it was held that the forfeiture from such a clause should not be enforced where the cause of the delay in payment was that the mortgagor in good faith, though erroneously, denied his liability. But, on the other hand, in Ferris v. Ferris, 28 Barb. 29, where the party, who was a married woman, relied upon the absence of her husband and her own ignorance as the reasons for the default, and as excusing it, the stipulation was nevertheless enforced. Bennett v. Stevenson, 53 N. Y. 508, clearly intimates and concedes that fraud or improper conduct on the part of the creditor in procuring the default would operate as an excuse, and be a sufficient ground for a court of equity to interfere and restrain an enforcement of the clause.

(b) In Moore v. Sargent, 112 Ind. 484, 14 N. E. 466, it was held that where the agreement was absolute that the whole amount should become due upon failure to pay one note, and nothing was said of any option, the right to insist upon an immediate payment was not lost by an acceptance of the amount due upon one note after its maturity. But see Huston v. Fatka, 30 Ind. App. 693, 66 N. E. 74.

(c) Thus, in Adams v. Rutherford, 13 Oreg. 78, 8 Pac. 896, the creditor purposely absented herself in order that she might take advantage of a

§ 440. **Liquidated Damages Described in General.**— The fourth instance to be mentioned of a stipulation which is not a penalty within the scope and meaning of the equitable doctrine is that for "liquidated damages." If the stipulation is one properly for liquidated damages, and not for a penalty, equity will not interfere with its enforcement, but if the case was one coming within the equitable jurisdiction, it would be treated as binding, and carried into effect by a court of equity.[a] In general, where the contract is for the performance or non-performance of some act other than the mere payment of money, and there is no certain measure of the injury which will be sustained from a violation of the agreement, the parties may, by an express clause inserted for that purpose, fix upon a sum in the nature of liquidated damages which shall be payable as a compensation for such violation.[1] [b] The question whether a sum thus stipulated

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[1] Rolfe v. Peterson, 2 Brown Parl. C., Tomlins's ed., 436; Lowe v. Peers, 4 Burr. 2225; Astley v. Weldon, 2 Bos. & P. 346; Jones v. Green, 3 Younge & J. 298; Woodward v. Gyles, 2 Vern. 119; Sainter v. Ferguson, 1 Macn. & G. 286; Bagley v. Peddie, 16 N. Y. 469, 69 Am. Dec. 713; Mott v. Mott, 11 Barb. 127; Dakin v. Williams, 17 Wend. 447, 22 Wend. 201; Smith v. Coe, 33 N. Y. Sup. Ct. 480; O'Donnell v. Rosenberg, 14 Abb. Pr., N. S., 59; Shute v. Hamilton, 3 Daly, 462; Wolfe Creek, etc., Co. v. Schultz, 71 Pa. St. 180; Streeper v. Williams, 48 Pa. St. 450; Pierce v. Fuller, 8 Mass. 223, 5 Am. Dec. 102; Cushing v. Drew, 97 Mass. 445; Tingley v. Cutler, 7 Conn. 291; Gammon v. Howe, 14 Me. 250; Peine v. Weber, 47 Ill. 41; Low v. Nolte, 16 Ill. 478; Brown v. Maulsby, 17 Ind. 10; Hamilton v. Overton, 6 Blackf. 206, 38 Am. Dec. 136; Yenner v. Hammond, 36 Wis. 277.

default in the payment of interest. The debtor made an attempt to pay, but did not make a technical tender. It was held that the creditor could not enforce the payment of the principal.

See *post*, §§ 826, 833.

(a) Cited to this effect in Moore v. Durnam, 63 N. J. Eq. 36, 51 Atl. 449.

(b) In Keeble v. Keeble, 85 Ala. 552, 5 South. 149, the text, §§ 440–446, is cited and the rules as to liquidated damages are laid down as in the paragraphs cited. In Condon v. Kemper, 47 Kan. 126, 27 Pac. 829, 13 L. R. A. 671, §§ 440–447 are cited. This section is cited with approval in Illinois Cent. R. R. Co. v. Southern Seating & Cabinet Co., 104 Tenn. 568, 78 Am. St. Rep. 933, 58 S. W. 303, 50 L. R. A. 729. See also Fasler v. Beard, 39 Minn. 32, 38 N. W. 755.

The controlling consideration seems to be that it would be difficult, if not impossible, to ascertain the damages to be paid is a "penalty" or is "liquidated damages" is often difficult to determine. It depends, however, upon a construction of the whole instrument, upon the real ? → intention of the parties as ascertained from all the language which they have used, from the nature of the act to be performed, or not to be performed, from the consequences which naturally result from a violation of the contract, and from the circumstances generally surrounding the transaction. It has been repeatedly held that the words "penalty" or "liquidated" damages, if actually used in the instrument, are not at all conclusive as to the char-

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actually sustained. Muse v. Swayne, 70 Tenn. (2 Lea) 251, 31 Am. Rep. 607; Tobler v. Austin, 22 Tex. Civ. App. 99, 53 S. W. 706; Studabaker v. White, 31 Ind. 211, 99 Am. Dec. 628; Schroeder v. Cal. Yukon Trading Co., 95 Fed. 296; Peekskill, S. C. & M. R. Co. v. Village of Peekskill, 47 N. Y. Supp. 305, 21 App. Div. 94 (affirmed in 59 N. E. 1128, 165 N. Y. 628); Willson v. Mayor, etc., of Baltimore, 83 Md. 203, 55 Am. St. Rep. 339, 34 Atl. 774; Mansur & Tebbetts Impl. Co. v. Willet (Okla.), 61 Pac. 1066; Brennan v. Clark, 29 Neb. 385, 45 N. W. 472; Nilson v. Town of Jonesboro, 57 Ark. 168, 20 S. W. 1093; May v. Crawford, 150 Mo. 504, 51 S. W. 693; De Graff, Vrieling & Co. v. Wickham, 89 Iowa 720, 52 N. W. 503; McIntosh v. Johnson, 8 Utah 359, 31 Pac. 450; Pogue v. Kaweah Power & Water Co. (Cal.), 72 Pac. 144. In Ward v. H. R. B. Co., 125 N. Y. 230, 26 N. E. 256, the rule was stated as follows: "We may, at most, say that where they have stipulated for a payment in liquidation of damages which are in their nature uncertain, and unascertainable with exactness, and may be dependent upon extrinsic considerations and circumstances, and the amount is not, on the face of the contract, out of all proportion to the probable loss, it will be treated as liquidated damages."

"Whether a contract is such that 'from the nature of the case' it would be impracticable or extremely difficult to fix the actual damage sustained by a breach thereof is a question of fact, which must be determined in each particular case." Pacific Factor Co. v. Adler, 90 Cal. 110, 25 Am. St. Rep. 102, 27 Pac. 36.

"Whether the sum mentioned shall be considered as a penalty or as liquidated damages is a question of construction on which the court may be aided by circumstances extraneous to the writing. The subject-matter of the contract, the intention of the parties, as well as other facts and circumstances, may be inquired into, although the words are to be taken as proved exclusively by the writing." Foley v. McKeegan, 4 Iowa (4 Clarke), 1, 66 Am. Dec. 107. See also Wallis Iron Works v. Monmouth Park Ass'n, 55 N. J. L. 132, 39 Am. St. Rep. 626, 26 Atl. 140, 19 L. R. A. 456; Sanford v. First Nat. Bank, 94 Iowa, 680, 63 N. W. 459; Taylor v. Times Newspaper Co., 83 Minn. 523, 85 Am. St. Rep. 473, 86 N. W. 760; Muse v. Swayne, 70 Tenn. (2 Lea) 251, 31 Am. Rep. 607;

acter of the stipulation. If upon the whole agreement the court can see that the sum stipulated to be paid was intended as a penalty, the designation of it by the parties as "liquidated damages" will not prevent this construction; if, on the other hand, the intent is plain that the sum shall be "liquidated damages," it will not be treated as a penalty because the parties have called it by that name. It is well settled, however, that if the intent is at all doubtful, the tendency of the courts is in favor of the interpretation which makes the sum a penalty.[2][c] The mere large-

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[2] Dimech v. Corlett, 12 Moore P. C. C. 199; Jones v. Green, 3 Younge & J. 304; Green v. Price, 13 Mees. & W. 701, 16 Mees. & W. 346; Betts v. Burch, 4 Hurl. & N. 511, per Bramwell, B.; Chilliner v. Chilliner, 2 Ves. 528; Coles v. Sims, 5 De Gex, M. & G. 1; Cushing v. Drew, 97 Mass. 445; Shute v. Taylor, 5 Met. 61; Wallis v. Carpenter, 13 Allen, 19; Lynde v. Thompson, 2 Allen, 456; Streeper v. Williams, 48 Pa. St. 450; Hatch v. Fogarty, 33 N. Y. Sup. Ct. 166; Hahn v. Horstman, 12 Bush, 249; Yenner v. Hammond, 36 Wis. 277 (the word "penalty" used, but construed to be liquidated damages); White v. Arlith, 1 Bond, 319; Hamaker v. Schroers, 49 Mo. 406; Shute v. Hamilton, 2 Daly, 462; Gillis v. Hall, 7 Phila. 422, 2 Brewst. 342. See also the cases cited in the next succeeding note. In Cushing v. Drew, 97 Mass. 445, the rule was thus stated by Chapman, J.: "The tendency and preference of the law is to regard a sum stated to be payable if a contract is not fulfilled as a penalty, and not as liquidated damages. Yet courts endeavor to learn

Emery v. Boyle, 200 Pa. St. 249, 49 Atl. 779; City of New Britain v. New Britain Tel. Co., 74 Conn. 326, 50 Atl. 881; Little v. Banks, 85 N. Y. 259; Kilbourne v. Burt & Brabb Lumber Co., 23 Ky. L. Rep. 985, 64 S. W. 631, 55 L. R. A. 275; Keck v. Bieber, 148 Pa. St. 645, 24 Atl. 170, 33 Am. St. Rep. 846; De Graff, Vrieling & Co. v. Wickham, 89 Iowa, 720, 52 N. W. 503; Hennessy v. Metzger, 152 Ill. 505, 38 N. E. 1058, 43 Am. St. Rep. 267. "If the sum be evidently fixed to evade a statute or to cloak oppression, the court will relieve by treating it as a penalty." Kilbourne v. Burt & Brabb Lumber Co., 23 Ky. L. Rep. 985, 64 S. W. 631, 55 L. R. A. 275. In the case of Williston v. Mathews, 55 Minn. 422, 56 N. W. 1112, there was a stipulation that in case of breach the other party might go into the market and buy at the expense of the defaulting party. It was held that before a provision in the contract can be given the effect of a stipulation fixing a measure of damages either greater or less than the law would give, it must fairly appear from its language, construed in the light of the nature of the contract and the situation of the parties, that they intended it to have that effect.

(c) Language of the Agreement not Conclusive.— The text is quoted in Sherburne v. Herst, 121 Fed. 998. See Foley v. McKeegan, 4 Iowa (4 Clarke), 1, 66 Am. Dec. 107; Weedon v. American Bonding & Trust Co., 128 N. C. 69, 38 S. E. 255.

In the following cases the stipulations were held to be for liquidated damages, although the word "pen-

ness of the sum fixed upon for the doing or not doing a particular act — that is, the fact of its being disproportioned in amount to the damage which results therefrom

from the subject-matter of the contract, the nature of the stipulations, and the surrounding circumstances, what was the real intent of the parties, and are governed by such intent." In Gillis v. Hall, 7 Phila. 422, 2 Brewst. 342, it was said that when a person has bound himself in a certain sum to do or not to do a certain thing, the court will look at the language of the contract, the intention of the parties as gathered from all its provisions, the subject-matter of the contract and its surroundings, the ease or difficulty of measuring the breach in damages, and the sum stipulated; and from the whole decide whether equity and good conscience require that said sum shall be treated as liquidated damages or only as a penalty. It does not seem possible to formulate the rule in any more comprehensive and accurate a manner than this. In White v. Arlith, 1 Bond, 319, it was held that if a sum stipulated to be paid on a breach is termed in the instrument a "penalty," it will always be treated only as a penalty; but if it is termed "liquidated damages," it may be treated as a penalty, if that appears to be the intent. This attempted distinction between the effect of using the word "penalty," and that of using the words "liquidated damages," is not only unsupported by authority, but is directly opposed to the whole current of authority, English and American.

alty" was used: Kunkle v. Wherry, 189 Pa. St. 198, 69 Am. St. Rep. 802, 42 Atl. 112; Muse v. Swayne, 70 Tenn. (2 Lea) 251, 31 Am. Rep. 607; Duffy v. Shockey, 11 Ind. 70, 71 Am. Dec. 348; Pastor v. Solomon, 54 N. Y. Supp. 575, 25 Misc. Rep. 322; Hardee v. Howard, 33 Ga. 533, 83 Am. Dec. 176; Robinson v. Centenary Fund & Preachers Aid Soc., 68 N. J. L. 723, 54 Atl. 416; In re White, 84 L. T. 594, 50 Wkly. Rep. 81.

In the following cases the stipulations were held to be for liquidated damages, although the word "forfeiture" or "forfeit" was used: McCurry v. Gibson, 108 Ala. 451, 54 Am. St. Rep. 177, 18 South. 806; Sanford v. First Nat. Bank, 94 Iowa, 680, 63 N. W. 459; Goldman v. Goldman, 51 La. Ann. 761, 25 South. 555; Pendleton v. Electric Light Co. (N. C.), 27 S. E. 1003; Pressed Steel Car Co. v. Eastern R'y Co., 121 Fed. 609; Dobbs v. Turner (Tex. Civ. App.), 70 S. W. 458; Eakin v. Scott, 70 Tex. 442, 7 S. W. 777; Hardie Tynes Foundry & Mach. Co. v. Glen Allen Oil Mill (Miss.), 36 South. 262.

In the following cases provisions were held penalties, although called liquidated damages by the parties: Condon v. Kemper, 47 Kan. 126, 27 Pac. 829, 13 L. R. A. 671; Gay Mfg. Co. v. Camp, 65 Fed. 794, 13 C. C. A. 137, 25 U. S. App. 134; Wilhelm v. Eaves, 21 Oreg. 194, 27 Pac. 1053, 14 L. R. A. 297.

In Wright v. Dobie, 3 Tex. Civ. App. 194, 22 S. W. 66, the word "forfeit" was used, and the court held that it was for the jury to say whether the intent was for a penalty or for liquidated damages. In Van Buren v. Degges, 52 U. S. (11 How.) 461, the court said: "The term 'forfeiture' imports a penalty; it has no necessary or natural connection with the measure or degree of injury which may result from a breach of contract, or from an imperfect performance. It implies an absolute infliction, regardless of the nature and

— will not of itself be a sufficient reason for holding it to be a penalty.[3] [d]

§ 441. Rules Determining Liquidated Damages and Penalties. — While it is impossible to formulate one universal cri-

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[3] Astley v. Weldon, 2 Bos. & P. 351; Chilliner v. Chilliner, 2 Ves. 528; Roy v. Duke of Beaufort, 2 Atk. 190; Logan v. Wienholt, 1 Clark & F. 611; Clement v. Cash, 21 N. Y. 253; Shiell v. McNitt, 9 Paige, 101; Dwinel v. Brown,

extent of the causes by which it is superinduced. Unless, therefore, it shall have been expressly adopted and declared by the parties to be a measure of injury or compensation, it is never taken as such by courts of justice, who leave it to be enforced where this can be done in its real character, viz.: that of a penalty." In Smith v. Brown, 164 Mass. 584, 42 N. E. 101, there was an agreement not to engage in business "under a penalty of one thousand dollars." The court said: "Even if the use of that word is not conclusive, it has been declared by this court and by others that very strong evidence would be required to authorize them to say that the parties' own words do not express their intention in this respect. The intention to liquidate damages may not prevail in all cases, but, if the intent expressed is to impose a penalty, the court cannot give the words a larger scope." In Kilbourne v. Burt & Brabb Lumber Co., 23 Ky. L. Rep. 985, 64 S. W. 631, 55 L. R. A. 275, the court said: "Where the word 'penalty' is used, it is generally conclusive against its being held liquidated damages." In Iroquois Furnace Co. v. Wilkin Mfg. Co., 181 Ill. 582, 54 N. E. 987, the court said: "The word 'penalty' *prima facie* excludes the notion of stipulated damages, although the use of either the word 'penalty' or the words 'liquidated damages' is not conclusive." In Williams v. Vance, 9 S. C. (9 Rich.) 344, 30 Am. Rep. 26, the court said: "When the parties declare that the sum or rate fixed shall be deemed liquidated damages, and the case is one in which they are at liberty so to declare, such declaration must stand unless inconsistent with other parts of the same instrument or unreasonable in itself. In inquiring whether it is reasonable it is not necessary to ask whether it is wise or considerate, but whether it is in conflict with the principles and practices that govern transactions of a like nature."

Where Meaning is Doubtful, the stipulation will be construed as a penalty. Heatwole v. Gorrell, 35 Kan. 692, 12 Pac. 135; Wallis Iron Works v. Monmouth Park Ass'n, 55 N. J. L. 132, 39 Am. St. Rep. 626, 26 Atl. 140, 19 L. R. A. 456; Foley v. McKeegan, 4 Iowa (4 Clarke), 1, 66 Am. Dec. 107; Johnson v. Cook, 24 Wash. 274, 64 Pac. 729; Amanda Consol. G. M. Co. v. People's M. & M. Co., 28 Colo. 251, 64 Pac. 218; Day Bros. Lumber Co. v. Ison, 23 Ky. L. Rep. 80, 62 S. W. 516; Baird v. Tolliver, 25 Tenn. (6 Humph.) 186, 44 Am. Dec. 298; Wilson v. Mayor, etc., of Baltimore, 83 Md. 203, 55 Am. St. Rep. 339, 34 Atl. 774; Brennan v. Clark, 29 Neb. 385, 45 N. W. 472; Iroquois Furnace Co. v. Wilkin Mfg. Co., 181 Ill. 582, 54 N. E. 987; Wilhelm v. Eaves, 21 Oreg. 194, 27 Pac. 1053, 14 L. R. A. 297; Gillihan v. Rollins, 41 Neb. 540, 59 N. W. 893.

(d) Disproportion of the Sum Fixed not Conclusive. — The text is supported in the recent case of Sun Printing and Pub. Ass'n v. Moore, terion by which the question of penalty or liquidated damages can be determined in every instance, certain particular rules have been well settled by the decisions, which apply to many important and customary forms and kinds of agreements, although there are, of course, numerous cases

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54 Me. 468; Morse v. Rathburn, 42 Mo. 594, 97 Am. Dec. 359; Gower v. Saltmarsh, 11 Mo. 27; Peine v. Weber, 47 Ill. 41; Gamble v. Linder, 76 Ill. 137; Williams v. Green, 14 Ark. 313; Hodges v. King, 7 Met. 583. Still the amount of the sum may always be taken into consideration as an aid to the court in determining the intention of the parties; and if it be altogether excessive, this may turn the scale in favor of declaring it intended as a penalty: Barry v. Wisdom, 5 Ohio St. 241; Perkins v. Lyman, 11 Mass. 76, 6 Am. Dec. 158; Lynde v. Thompson, 2 Allen, 456, 459; Hodgson v. King, 7 Met. 583; Streeper v. Williams, 48 Pa. St. 450; Curry v. Larer, 7 Pa. St. 470, 49 Am. Dec. 486; Colwell v. Lawrence, 38 Barb. 643, 38 N. Y. 71.

183 U. S. 642, 22 Sup. Ct. 240. The court reviewed a long list of authorities, expressed disapproval of the cases of Chicago House-Wrecking Co. v. U. S., 166 Fed. 385, 45 C. C. A. 343, 53 L. R. A. 122, and Gay Mfg. Co. v. Camp, 65 Fed. 794, 25 U. S. App. 134, 13 C. C. A. 137, 68 Fed. 67, 25 U. S. App. 376, 15 C. C. A. 226, and announced its conclusion as follows: "It may, we think, fairly be stated that when a claimed disproportion has been asserted in actions at law, it has usually been an excessive disproportion between the stipulated sum and the possible damages resulting from a trivial breach apparent on the face of the contract, and the question of disproportion has been simply an element entering into the consideration of the question of what was the intent of the parties, whether *bona fide* to fix the damages, or to stipulate the payment of an arbitrary sum as a penalty, by way of security." See also Taylor v. Times Newspaper Co., 83 Minn. 523, 85 Am. St. Rep. 473, 86 N. W. 760. And see Keeble v. Keeble, 85 Ala. 552, 5 South. 149. In this case it was argued that inasmuch as it was possible for a breach to occur with no actual damages, other than nominal, the amount agreed upon should be construed as a penalty. In answer, the court pointed out that such is the character of most agreements, and held that it could not enter into an investigation of the *quantum* of damages.

Where the amount stipulated for is unreasonable it is evidence that the parties did not intend to provide for compensatory damages, and the provision will be held a penalty. Condon v. Kemper, 47 Kan. 126, 27 Pac. 829, 13 L. R. A. 671. See also Iroquois Furnace Co. v. Wilkin Mfg. Co., 181 Ill. 582, 54 N. E. 987; Northwest Fixture Co. v. Kilbourne & Clark Co. (C. C. A.), 128 Fed. 256. "Although a sum be named as 'liquidated damages' the courts will not so treat it, unless it bear such proportion to the actual damages that it may reasonably be presumed to have been arrived at upon a fair estimation by the parties of the compensation to be paid for the prospective loss. If the supposed stipulation greatly exceed the actual loss, — if there be no approximation between them, and this be made to appear by the evidence,— then, it seems which cannot easily be brought within the operation of either of them. The following are the rules which have thus been established by judicial authority.

First. Wherever the payment of a smaller sum is secured by a larger, the larger sum thus contracted for can never be treated as liquidated damages, but must always be considered as a penalty.[1] [a]

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[1] Aylett v. Dodd, 2 Atk. 239; Astley v. Weldon, 2 Bos. & P. 350–354; Lampman v. Cochran, 16 N. Y. 275; Clement v. Cash, 21 N. Y. 253, 260; Bagley v. Peddie, 16 N. Y. 469, 471, 69 Am. Dec. 713; Dakin v. Williams, 17 Wend. 447, 22 Wend. 401; Tiernan v. Hamman, 16 Ill. 400. The stipulation creates a penalty within this rule, whatever be the form of the contract secured, if it be in effect one for the payment of money; that is, where it may not in express terms provide for the payment of money, but its performance results in such payment. As examples: In an agreement to stay the enforcement of a decree of mortgage foreclosure for a specified time, a stipulation to pay a fixed sum upon default in performing the decree was held to be a penalty: Kuhn v. Meyers, 37 Iowa, 351; and in an agreement to pay the plaintiff's

to us, and then only, should the actual damages be the measure of recovery;" Collier v. Betterton, 87 Tex. 442, 29 S. W. 468. Accordingly, in Wilcox v. Walker (Tex. Civ. App.), 43 S. W. 579, where there was a stipulation to keep property insured or pay a certain amount in case of fire, it was held that the defendant might show that the property was of no value. In Weedon v. American Bonding & Trust Co., 128 N. C. 69, 38 S. E. 255, damages for delay in completing a building were fixed at $10 per day. The rental value of the building was $30 per month. It was held that the sum was a penalty, the court saying (quoting from Ward v. Building Co., 125 N. Y. 230, 26 N. E. 256) that "when the sum specified in the contract as liquidated damages is disproportionate to the presumed or probable damage or to a readily ascertainable loss, the courts will treat it as a penalty, and will relieve on the principle that the precise sum was not of the essence of the contract, but was in the nature of security for performance." A similar result on similar facts was reached in Cochran v. People's R'y Co., 113 Mo. 359, 21 S. W. 6; Jennings v. Willer (Tex. Civ. App.), 32 S. W. 24. In J. G. Wagner Co. v. Cawker, 112 Wis. 532, 88 N. W. 532 the question arose over a stipulation for liquidated damages for delay. The court intimated that if the amount were greatly disproportionate to the actual damage it should be considered a penalty. Where the amount is unreasonable and the enforcement would work a hardship, the stipulation will be held to be a penalty; Dennis v. Cummins, 3 Johns. Cas. 297, 2 Am. Dec. 160. In Gillihan v. Rollins, 41 Neb. 540, 59 N. W. 893, the court held that stipulations will be held to be for liquidated damages only "when to do so will no more than compensate for his loss."

(a) See Chicago House-Wrecking Co. v. U. S., 106 Fed. 385, 45 C. C. A. 343, 53 L. R. A. 122; Brennan v. Clark, 29 Neb. 385, 45 N. W. 472; Kilbourne v. Burt & Brabb

§ 442. *Second.* Where an agreement is for the performance or non-performance of only one act, and there is no adequate means of ascertaining the precise damage which may result from a violation, the parties may, if they please, by a separate clause of the contract, fix upon the amount

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debts, and to save him harmless from any suit which might be brought upon such demands, a stipulation to pay a fixed sum upon default was held to be a penalty: Morris v. McCoy, 7 Nev. 399. The stipulation is held to be a penalty, not only when it thus certainly provides for the payment of a larger sum upon a default in paying a smaller amount, but also where it may possibly lead to such a result: Spear v. Smith, 1 Denio, 465; Hoag v. McGinnis, 22 Wend. 163; Niver v. Rossman, 18 Barb. 50; Gregg v. Crosby, 18 Johns. 219, 226; Curry v. Larer, 7 Pa. St. 470, 49 Am. Dec. 486. In Spear v. Smith, 1 Denio, 465, there was an agreement to comply with the decision of arbitrators to whom a controversy had been submitted, or else to pay one hundred dollars, and the latter sum was held to be a penalty, because the award might be for the payment of a sum of money, as in fact it was. It is partly for this reason that where a contract contains several stipulations, some for the payment of money, and others for the *doing* or not doing of specified acts, an additional provision binding a party to pay a fixed sum in case of his default in any of these matters is necessarily a penalty: Whitfield v. Levy, 35 N. J. L. 149; Shiell v. McNitt, 9 Paige, 101, 106; Niver v. Rossman, 18 Barb. 50. In Whitfield v. Levy, 35 N. J. L. 149, the purchaser of a grocery promised to pay one thousand three hundred dollars as the price, and the seller promised not to engage in the same business for ten years, and the contract added

Lumber Co., 23 Ky. L. Rep. 985, 64 S. W. 631, 55 L. R. A. 275; Walsh v. Curtis, 73 Minn. 254, 76 N. W. 52. A stipulation in a mortgage that if default is made in the payment of interest or principal at the times designated, the mortgagors will pay interest on the principal at the rate of twelve per cent per annum from the date of the note until payment is made, the rate of interest in the absence of such default being only seven per cent per annum, is a stipulation for a penalty, and not enforceable in equity: Krutz v. Robbins, 12 Wash. 7, 40 Pac. 415, 50 Am. St. Rep. 871, 28 L. R. A. 676, and cases cited; Richardson v. Campbell, 34 Neb. 181, 51 N. W. 753, 33 Am. St. Rep. 633. In Goodyear Shoe Mach. Co. v. Selz, Schwab & Co., 157 Ill. 186, 41 N. E. 625, a lessor agreed that "if the rents and royalties due on the first day of any month shall be paid on or before the fifteenth day of that month, it will, in consideration thereof, grant a discount of fifty per cent." This was held to provide for a penalty. In Gay Mfg. Co. v. Camp, 65 Fed. 794, 13 C. C. A. 137, 25 U. S. App. 134, there was an agreement for stipulated damages in case of a default by a lessee in the payment of rent. The court held the provision to be a penalty. In Mason v. Callender, 2 Minn. 350, 72 Am. Dec. 102, a promissory note which provided for a greater rate of interest after maturity than before was before the court. It was held that after maturity only damages could be recovered, and that the provision had the effect of making a larger sum due upon failure to pay a smaller. Hence the provision was of compensation payable by the defaulting party in case of a breach; and a stipulation inserted for such purpose will be treated as one for "liquidated damages," unless the intent be clear that it was designed to be only a penalty.[1] [a]

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that the parties "bound themselves to each other under the penalty of five hundred dollars, to be paid by him who should fail to carry out this agreement." The five hundred dollars was held to be a penalty as to both the parties, since it was necessarily so with respect to the purchaser's covenant to pay the price. Although this rule with respect to penalties intended as a security for payment of money is generally adopted and enforced by courts of law as well by those of equity, yet it seems that a contract in express terms to pay a larger sum, exceeding the interest, as compensation for delay in paying a smaller amount, may be valid and operative at law, when not contrary to the statutes against usury: See Davis v. Hendrie, 1 Mont. Ter. 499; Hardee v. Howard, 33 Ga. 533, 83 Am. Dec. 176; Sutton v. Howard, 33 Ga. 536; Goldworthy v. Strutt, 1 Ex. 659, 665; Lynde v. Thompson, 2 Allen, 456, 459. Every such contract would, however, be relieved against in equity.

[1] The leading case under this rule is Rolfe v. Peterson, 2 Brown Parl. C., Tomlins's ed., 436, where a lessee covenanted not to plow up any of the ancient meadow or pasture land, and if he did he was to pay an additional rent of five pounds per acre. This additional rent was held by the house of lords to be liquidated damages. The same has been held in other cases with respect

held to be a penalty. See also Gower v. Carter, 3 Iowa (3 Clarke), 244, 66 Am. Dec. 71. But see Close v. Riddle, 40 Oreg. 592, 67 Pac. 932, 91 Am. St. Rep. 580, and note. In Morrill v. Weeks, 70 N. H. 178, 46 Atl. 32, the court said: "The intention of the parties is generally the test to determine whether a promise to pay a fixed sum of money for any default in the performance of a contract is in the nature of a penalty or of liquidated damages. But a promise to pay a large sum of money in the event of a default in the payment of a much smaller sum is an exception to this rule; for the law makes interest the measure of damages for failure to pay money when it is due, and will not permit parties to avoid the usury laws in this way. Such a promise will be treated as a penalty, and not as liquidated damages."

(a) Provisions for damages for the breach of the following agreements have been held to be liquidated damages: To provide a theater for plaintiff's theatrical company: Mawson v. Leavitt, 37 N. Y. Supp. 1138, 16 Misc. Rep. 289. To build on land conveyed to defendant: Everett Land Co. v. Maney, 16 Wash. 552, 48 Pac. 243. To provide quick transit for the inhabitants of a village: Peekskill, S. C. & M. R. Co. v. Village of Peekskill, 47 N. Y. Supp. 305, 21 App. Div. 94 (affirming 59 N. E. 1128, 165 N. Y. 628). By a telephone company, not to cease competition: City of New Britain v. New Britain Tel. Co., 74 Conn. 326, 50 Atl. 881. To submit a controversy to a judge without service of summons, etc.: Pendleton v. Electric Light Co. (N. C.), 27 S. E. 1003. Not to sell a patent medicine at less than the regular price: Garst v. Harris, 177

§ 443. *Third.* Where an agreement contains provisions for the performance or non-performance of several acts of

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to similar covenants by lessees: Woodward v. Gyles, 2 Vern. 119; Jones v. Green, 3 Younge & J. 298. This rule has been applied in many cases, where a party, either in connection with a sale of his stock in trade and good-will, or under other circumstances, covenants that he will not carry on his trade or business within certain limits, and adds a clause making himself liable to pay a specified sum upon any violation of the covenant; such sum is liquidated

Mass. 72, 58 N. E. 174. To keep an account and pay a certain percentage for the rent of machines, the breach being the failure to keep the account: Standard Button Fastening Co. v. Breed, 163 Mass. 10, 39 N. E. 346. Not to publish a libel on plaintiff: Emery v. Boyle, 200 Pa. St. 249, 49 Atl. 779. To employ plaintiff and pay him a certain percentage, the breach being a discharge: Glynn v. Moran, 174 Mass. 233, 54 N. E. 535. To work for one party: Fisher v. Walsh (Wis.), 78 N. W. 437. A contract for services stipulating that if the employee shall leave the service without giving two weeks' previous notice of his intention to do so, he shall forfeit a specified sum, which may be deducted from the wages due him, is valid, especially if the circumstances and nature of the employment are such that it will be difficult to calculate with any certainty the actual loss resulting to the employer from the abandonment of the employment without previous notice: Tennessee Mfg. Co. v. James, 91 Tenn. 154, 18 S. W. 262, 30 Am. St. Rep. 865, 15 L. R. A. 211. But see Schrimpf v. Tennessee Mfg. Co., 86 Tenn. 219, 6 S. W. 131, 6 Am. St. Rep. 832. In Missouri-Edison Elect. Co. v. M. J. Steinberg Hat & Fur Co., 94 Mo. App. 543, 68 S. W. 383, plaintiff agreed to give defendant a discount if defendant should use plaintiff's power for a year. Defendant broke the contract, and plaintiff sued to recover the amount of the discount. It was held that plaintiff was entitled to this relief. In Knox Rock-Blasting Co. v. Grafton Stone Co., 60 Ohio St. 361, 60 N. E. 563, it was agreed that if defendant should continue to use a patent after the termination of his license, without obtaining a new one, he should pay double the former fees for the time of such user. This was held to be a stipulation for liquidated damages. In Keeble v. Keeble, 85 Ala. 552, 5 South. 149, it was held that a stipulation by a business manager to wholly abstain from the use of intoxicating liquors was for liquidated damages. Section 442, note 1, of this work was cited as authority. In the following cases the breaches of the agreements were held to be such that damages were easily ascertainable, and therefore the stipulations were held to be penalties: Agreement between creditors to grant an extension and not to purchase stock of the debtor: Hill v. Wertheimer-Swarts Shoe Co., 150 Mo. 483, 51 S. W. 702. Agreement to pay a certain sum if a lighter hired should be lost: Wilmington Transp. Co. v. O'Neil, 98 Cal. 1, 32 Pac. 795. For miscellaneous examples, see Carey v. Mackey, 82 Me. 516, 20 Atl. 84, 17 Am. St. Rep. 500, 9 L. R. A. 113; Menges v. Milton Piano Co. (Mo.), 70 S. W. 250; Deuninck v. West Gallatin Irr. Co., 28 Mont. 255, 72 Pac. 618; Cæsar v. Rubinson, 174 N. Y. 492, 67 N. E. 58; Stony Creek Lumber Co. v. Fields (Va.), 45 S. E. 797. Where it appears that the amount different degrees of importance, and then a certain sum is stipulated to be paid upon a violation of any or of all

damages:[b] Green v. Price, 13 Mees. & W. 695, 16 Mees. & W. 354; Atkins v. Kinnier, 4 Ex. 776; Rawlinson v. Clarke, 14 Mees. & W. 187; Galcsworthy v. Strutt, 1 Ex. 659; Streeter v. Rush, 25 Cal. 67; Cushing v. Drew, 97 Mass. 445. In the leading case of this class (Green v. Price, 13 Mees. & W. 695) defendant had covenanted not to carry on the business of a hair-dresser or perfumer within sixty miles of London, and bound himself in the sum of five thousand pounds in case of a violation. Having violated the contract, he was held liable in that sum, whether it did or did not exceed the actual damage sustained by the plaintiff. In Cushing v. Drew, 97 Mass. 445, the plaintiff had sold his business as an expressman to the defendant for six hundred dollars, and agreed not to carry on the same business within specified limits,

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stipulated for is to be in addition to actual damages, it will be construed to be a penalty. Meyer v. Estes, 164 Mass. 457, 41 N. E. 683, 32 L. R. A. 283; Foote & Davies Co. v. Maloney, 115 Ga. 985, 42 S. E. 413.

(b) **Covenant not to Carry on a Business.**— See McCurry v. Gibson, 108 Ala. 451, 54 Am. St. Rep. 177, 18 South. 806; Franz v. Bieler, 126 Cal. 176, 56 Pac. 249, 58 Pac. 466; Potter v. Ahrens, 110 Cal. 674, 43 Pac. 388; California Steam Nav. Co. v. Wright, 6 Cal. 258, 65 Am. Dec. 511; Duffy v. Shockey, 11 Ind. 70, 71 Am. Dec. 348; Miller v. Elliott, 1 Ind. (1 Cart.) 484, 50 Am. Dec. 475; Studabaker v. White, 31 Ind. 211, 99 Am. Dec. 628; Goldman v. Goldman, 51 La. Ann. 761, 25 South. 761; Holbrook v. Tobey, 66 Me. 419, 22 Am. Rep. 581; Dunlop v. Gregory, 10 N. Y. (6 Seld.) 241, 61 Am. Dec. 746; Breck v. Ringler, 59 Hun, 623, 13 N. Y. Supp. 501; Kelso v. Reid, 145 Pa. St. 696, 23 Atl. 323, 27 Am. St. Rep. 716; Muse v. Swayne, 70 Tenn. (2 Lea) 251, 31 Am. Rep. 607; Tobler v. Austin, 22 Tex. Civ. App. 99, 53 S. W. 706; Rucker v. Campbell (Tex. Civ. App.), 79 S. W. 627. In Smith v. Brown, 164 Mass. 584, 42 N. E. 101, however, where the stipulation was penal in form, it was held to be a penalty; and in Wilkinson v. Colley, 164 Pa. St. 35, 30 Atl. 286, 35 Wkly. Notes Cas. 177, 26 L. R. A. 114, where the defendant sought to have the stipulation declared to be for liquidated damages in order to prevent the issuance of an injunction and where the amount stipulated was much less than the actual damage, a like result was reached. And in Heatwole v. Gorrell, 35 Kan. 692, 12 Pac. 135, where the defendant bound himself "in the sum of $500" not to engage in business, the court held that the stipulation was for a penalty, saying that an instrument containing such words is always *prima facie* penal. See also Radloff v. Haase, 196 Ill. 365, 63 N. E. 729; Moore v. Colt, 127 Pa. St. 289, 18 Atl. 8, 14 Am. St. Rep. 845. A stipulation to act for plaintiff and not to violate the agreement "under a penalty of five hundred dollars" was held to be for liquidated damages in Pastor v. Solomon, 54 N. Y. Supp. 575, 25 Misc. Rep. 322. In Borley v. McDonald, 69 Vt. 309, 38 Atl. 60, an employee agreed not to solicit insurance for others within a certain time after leaving plaintiff's employ, and agreed "to forfeit and pay" a certain sum as liquidated damages in case of breach. The court held this to be a provision for liquidated damages.

such provisions, and the sum will be in some instances too large and in others too small a compensation for the

and if he failed to observe this agreement he was to pay the defendant nine hundred dollars. This sum was held to be liquidated damages. The test was stated by the court as follows: "The stipulation is for a simple thing, namely, to abstain from interference with the business which the plaintiff had sold to the defendant, and it is difficult to ascertain the damages that may result from the breach of such a contract." Another not uncommon instance under this rule, in which the sum is liquidated damages, is found in contracts for the sale and purchase of land, where the vendor agrees to execute a deed by a specified day, or if not, that he will be liable to pay a certain sum:[c] Chamberlain v. Bagley, 11 N. H. 234; Durst v. Swift, 11 Tex. 274; or the vendee agrees to accept the deed and complete the purchase at a day named, or else that he will pay a certain sum: Mundy v. Culver, 18 Barb. 336; Holmes v. Holmes, 12 Barb. 137; Gammon v. Howe, 14 Me. 250; Williams v. Green, 14 Ark. 315; Yenner v. Hammond, 36 Wis. 277; or in a contract for the exchange of lands, the parties insert a similar stipulation: Gibb v. Linder, 7[illegible] Ill. 137. The rule has been applied in like manner to the stipulation in a lease by which the lessee is to be liable in a certain amount if he violates some single specified covenant on his part; as where a lessee covenanted that he would not, before a day named, negotiate for, or accept, or be interested in any lease of certain premises, except from the plaintiff, under a forfeiture of ten thousand dollars, and this was held to be liquidated damages, so that defendant was liable for that amount:[d] Smith v. Coe, 33 N. Y. Sup. Ct. 480; and where a lessee stipulated to pay five hundred dollars if he failed to surrender up the premises by a certain day: Peine v. Weber, 47 Ill. 41. The following are further examples of the rule, the certain sum of money stipulated to be paid for a violation of the main agreement being in each case liquidated damages. In a building contract containing clauses fixing the days for completing various parts of the work, a stipulation that for any failure by the

(c) **Transfer of Land — Liquidated Damages.**— In Lorins v. Abbott, 49 Neb. 214, 68 N. W. 486, it was agreed that if defendant should fail to convey certain property to the plaintiff, the latter was to have the use and control of the premises for one year. It was held that the agreement called for liquidated damages.

Penalties.— Agreement to deliver possession of land: Eva v. McMahon, 77 Cal. 467, 19 Pac. 872. Agreement to buy land: Monroe v. South, (Tex. Civ. App.), 64 S. W. 1014. Agreement to quitclaim a mining location if plaintiff should secure a patent: O'Keefe v. Dyer, 20 Mont. 477, 52 Pac. 196.

(d) **Agreements between Lessor and Lessee — Liquidated Damages.**— By a lessor, to lease real property: Engelhardt v. Batla (Tex. Civ. App.), 31 S. W. 324, 40 S. W. 150. Not to oust a tenant before the termination of his lease: Guerin v. Stacy, 175 Mass. 595, 56 N. E. 892. Not to hold over after expiration of tenancy: Poppers v. Meagher, 184 Ill. 192, 35 N. E. 805. By a lessee under a coal lease, to mine not less than a certain number of tons per year and pay a royalty thereon: Martin v. Berwind-White Coal Min. Co., 114 Fed. 553.

Penalties.—Agreement by tenant to pay a certain sum in case he should be evicted for non-payment of rent:

injury thereby occasioned, that sum is to be treated as a penalty, and not as liquidated damages. This rule has

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builder to comply with these provisions and to finish the work as agreed, the employer might claim compensation at the rate of ten dollars per day for every day of such detention:[e] O'Donnell v. Rosenberg, 14 Abb. Pr., N. S., 59; and in a contract to furnish a coal company all the timber needed for their mine during a year, to be paid for at the rate of eighteen cents on each ton of all the coal mined during the year, but if the amount mined during the year should not equal seventy-five thousand tons, then the company were "to

Jack v. Sinsheimer, 125 Cal. 563, 58 Pac. 130.

(e) **Building Contracts.**— If the amount of damage caused by delay is uncertain, the parties are allowed to stipulate for a fixed amount: Texas, etc., R'y Co. v. Rust, 19 Fed. 239; Lincoln v. Little Rock Granite Co., 56 Ark. 405, 19 S. W. 1056; Young v. Gaunt, 69 Ark. 104, 61 S. W. 372; Lawrence County v. Stewart Bros. (Ark.), 81 S. W. 1059; De Graff, Vrieling & Co. v. Wickham, 89 Iowa, 720, 52 N. W. 503; McKee v. Rapp, 35 N. Y. Supp. 175; Hutton Bros. v. Gordon, 2 Misc. Rep. 267, 23 N. Y. Supp. 770; Ward v. Hudson River Bldg. Co., 125 N. Y. 230, 26 N. E. 256; White v. School Dist. of Braddock Borough, 159 Pa. St. 201, 28 Atl. 136; Carter & Co. v. Kaufman (S. C.), 45 S. E. 1017; Mills v. Paul (Tex. Civ. App.), 30 S. W. 558; Brown Iron Co. v. Norwood (Tex. Civ. App.), 69 S. W. 253; Drumheller v. American Surety Co., 30 Wash. 530, 71 Pac. 25. Such provisions in the following contracts have been sustained:

To build a public bridge.— Malone v. City of Philadelphia, 147 Pa. St. 416, 23 Atl. 628, 29 Wkly. Notes Cas. 251. *To build a public building.*— Heard v. Dooly County, 100 Ga. 619, 28 S. E. 986 (court house); Ferrier v. Knox County (Tex. Civ. App.), 33 S. W. 896; Harris County v. Donaldson, 20 Tex. Civ. App. 9, 48 S. W. 791 (furnishing a court room); Brooks v. City of Wichita, 114 Fed. 297, 52 C. C. A. 209. *To perform public work.*— Thorn & Hunkins Lime & Cement Co. v. Citizens' Bank, 158 Mo. 172, 59 S. W. 109 (construction of sewer); Hipp v. City of Houston, 30 Tex. Civ. App. 573, 71 S. W. 39 (paving streets). *To construct a mill or factory.*— Hennessy v. Metzger, 152 Ill. 505, 38 N. E. 1058, 43 Am. St. Rep. 267 (mill); Curtis v. Van Bergh, 161 N. Y. 47, 55 N. E. 398 (factory). *To erect a church.*— Bird v. Rector, etc., of St. John's Episcopal Church, 154 Ind. 138, 56 N. E. 129. *Miscellaneous.*— Manistee Iron Works Co. v. Shores Lumber Co., 92 Wis. 21, 65 N. W. 863 (refitting a barge); Kilbourne v. Burt & Brabb Lumber Co., 23 Ky. L. Rep. 985, 64 S. W. 631, 55 L. R. A. 275 (delivery of logs); Illinois Cent. R. R. Co. v. Southern Seating & Cabinet Co., 104 Tenn. 568, 78 Am. St. Rep. 933, 58 S. W. 303, 50 L. R. A. 729 (delivery of church pews); Hardie Tynes Foundry Co. v. Glen Allen Oil Mill (Miss.), 36 South. 262 (delay in delivering engine). Where a building is being constructed for a particular use, and it would be impossible to estimate the value of that use correctly, a provision against delay will be sustained, although the building may have some ascertainable value for other purposes. Such is the case in a contract for the construction of a home for aged men: Kelly v. Fejerbeen laid down in a somewhat different form, as follows: Where the agreement contains provisions for the per-

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pay the difference between the amount mined and seventy-five thousand tons, at a rate of eighteen cents per ton;" this eighteen cents per ton on the difference, etc., was held liquidated damages: Wolf Creek, etc., Co. v. Schultz, 71 Pa. St. 180; and see a similar contract in Powell v. Burroughs, 54 Pa. St. 329, 336; an agreement to improve land on which the other party has a mortgage or lien: Pearson v. Williams, 24 Wend. 246, 26 Wend. 630; an agreement guaranteeing the validity of a patent right: Brewster v. Edgerly, 13 N. H. 275; an agreement to perform certain work and labor, or to furnish

vary (Iowa), 78 N. W. 828. In Reichenbach v. Sage, 13 Wash. 364, 43 Pac. 354, 52 Am. St. Rep. 51, such a provision in a contract for the construction of a residence was upheld. The court said: "Values of rents are fluctuating, and dwelling-houses of the character and description of this one are ordinarily not built for rent at all, but for the convenience and comfort of the owners; and, inasmuch as the parties saw fit to settle in advance the question of damages, and it seems to be on an equitable basis, we do not feel justified in disturbing that contract, and holding that it was a contract which the parties had no right to make." If the rental value is a proper measure of damage the provision, in some jurisdictions, is held to be a penalty: Patent Brick Co. v. Moore, 75 Cal. 205, 16 Pac. 890; Brennan v. Clark, 29 Neb. 385, 45 N. W. 472. But the party who is maintaining that a provision is a penalty because there is an ascertained rental value must show what the rental value is: De Graff, Vrieling & Co. v. Wickham, 89 Iowa, 720, 52 N. W. 503. It is quite frequently stated that the amount agreed upon must not be unreasonable and out of proportion to the probable damages. The rule is well stated in Collier v. Betterton, 87 Tex. 440, 29 S. W. 467: "Therefore the principle would seem to be that, although a sum be named as 'liquidated damages,' the courts will not so treat it, unless it bear such proportion to the actual damages that it may reasonably be presumed to have been arrived at upon a fair estimation by the parties of the compensation to be paid for the prospective loss. If the supposed stipulation greatly exceed the actual loss, if there be no approximation between them, and this be made to appear by the evidence, then, it seems to us, and then only, should the actual damages be the measure of the recovery." See also Mills v. Paul (Tex. Civ. App.), 30 S. W. 558. In the following cases it was held that the amounts stipulated for were reasonable: Ward v. Hudson River Bldg. Co., 125 N. Y. 230, 26 N. E. 256; Curtis v. Van Bergh, 161 N. Y. 47, 55 N. E. 398; Bird v. Rector, etc., of St. John's Episcopal Church, 154 Ind. 138, 56 N. E. 129; De Graff, Vrieling & Co. v. Wickham, 89 Iowa, 720, 52 N. W. 503; Heard v. Dooly County, 101 Ga. 619, 28 S. E. 986; Lincoln v. Little Rock Granite Co., 56 Ark. 405, 19 S. W. 1056; Thorn & Hunkins Lime & Cement Co. v. Citizens' Bank, 158 Mo. 172, 59 S. W. 109. But in Cochran v. People's R'y Co., 113 Mo. 359, 21 S. W. 6, the amount stipulated for was held to be so disproportionate to the actual damage as to be a penalty. See also Weedon v. American Bonding & Trust Co., 38 S. E. 255, 128 N. C. 69; Cochran v. People's R'y formance or non-performance of acts which are not measurable by any exact pecuniary standard, and also of one

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certain materials, within a specified time:[f] Curtis v. Brewer, 17 Pick. 513; Faunce v. Burke, 19 N. J. L. 469, 55 Am. Dec. 519; an agreement for the punctual payments of an annuity: Berrikott v. Traphagen, 39 Wis. 220. In applying this second rule of the text, it is important to observe that a contract may come within its scope and operation, which includes various particulars differing in kind and importance, provided they are in effect one; all taken together only make up one whole, the violation of which is to be compensated by the fixed sum. In other words, a contract of this kind does not necessarily fall under the third rule given in the text; but the sum made payable may be liquidated damages. The intention of the parties, however, as ascertained from the whole instrument, would guide the court: Clement v. Cash, 21 N. Y. 253; Bagley v. Peddie, 16 N. Y. 470, 69 Am. Dec. 713; Cotheal v. Talmage, 9 N. Y. 551, 61 Am. Dec. 716; Leary v. Laflin, 101 Mass. 334. In Clement v. Cash, 21 N. Y. 253, Wright, J., applied the rule as follows: "The contract in question, in legal effect, provided but for the performance of a single act on each side, and at the same period of time, viz., the execution and delivery of a deed of the land by the defendant, and payment therefor by the plaintiff. That the defendant agreed to receive in payment for his deed, and the plaintiff to pay simultaneously with its delivery, the consideration in money *and other property*, cannot divest what was to be done of the character of a single transaction. If the defendant failed to convey, or the plaintiff to make payment in the way covenanted, there was a total non-performance. The consideration to be paid was nine thousand dollars, of which four thousand was to be in cash, and five thousand dollars in securities, the cash and transfers of the securities to be passed over to the defendant on receipt of the deed." In Cotheal v. Talmage, 9 N. Y. 551, 61 Am. Dec. 716, the defendant and others had severally covenanted that they would diligently devote themselves to obtaining gold and other precious metals by mining in California, under regulations specified in the agreement; that a certain portion of the earnings of each should be paid to the plaintiff; and that any of them who failed to keep his engagement should pay five hundred dollars. The defendant had violated the agreement by absenting himself from

Co., 113 Mo. 359, 21 S. W. 6; Jennings v. Willer (Tex. Civ. App.), 32 S. W. 24; J. G. Wagner Co. v. Cawker, 112 Wis. 532, 88 N. W. 532; Lee v. Carroll Normal School Co. (Neb.), 96 N. W. 65; Coen & Conway v. Birchard (Iowa), 100 N. W. 48. For a discussion of the general application of the principles here laid down, see § 440, note. In Willis v. Webster, 1 App. Div. 301, 37 N. Y. Supp. 354, it was held that where the owner is responsible for part of the delay, he is not entitled to liquidated damages, for they cannot be apportioned.

(f) **To Perform Work within a Certain Time — Liquidated Damages.** — Agreement to fulfill the terms of a franchise and have an electric light plant in operation by a certain time: City of Salem v. Anson, 40 Oreg. 339, 67 Pac. 190, 56 L. R. A. 169.

Penalties.—Agreement to repair fire hydrants within a certain time: Light, Heat & Water Co. v. City of Jackson, 73 Miss. 598, 19 South. 771.

or more other acts in respect of which the damages are easily ascertainable by a jury, and a certain sum is stipu-

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the mining district, and refusing to devote himself to the search for gold. The five hundred dollars was held to be liquidated damages, since all the particulars agreed to be done were not independent stipulations, but together constituted a single undertaking which the defendant was bound to perform. In Leary v. Laflin, 101 Mass. 334, the lessee of a livery-stable bound himself for the payment of one thousand dollars, if he, the lessee, "should not keep the stable during the demised term in a manner as satisfactory to all reasonable parties as the lessor had done, and at the end of the term surrender said premises and good-will in as good repute and run of custom as now thereto pertain;" and the one thousand dollars was on the same ground held to be liquidated damages.

Does this second rule of the text include in its operation contracts for the purchase and sale of goods and chattels or securities? It has been said that it does not, and that a stipulation to pay a fixed sum on the violation of such a contract must necessarily be a penalty, since the legal measure of damages can always be exactly ascertained, being in fact prescribed by the law, namely, the difference between the market price and the price agreed to be paid: Jemmison v. Gray, 29 Iowa, 537; Lee v. Overstreet, 44 Ga. 507; Shreve v. Brereton, 51 Pa. St. 175, 186; Burr v. Todd, 41 Pa. St. 209; Taylor v. The Marcella, 1 Woods, 302. It is plain that there are many cases in respect of which this reasoning is sound and this conclusion is just. It is equally plain that there is another class of cases to which neither this reasoning nor conclusion can apply. In many contracts for the purchase and sale of personal property, there is no such means of accurately measuring the damages which result from a violation. If the agreement is for the sale generally of things of a certain kind or description, on a default the vendee can, as a rule, go into the market and purchase other articles answering to the description; the measure of his loss is then fixed by the law at the difference between the market price which he pays, and the agreed price; and any certain sum stipulated to be paid him by way of compensation would be a penalty. But where the agreement is for the sale and delivery of *certain specified* things, there may not be any mode of ascertaining the amount of loss resulting from a nonperformance, and the certain sum fixed upon by the contract *may* be liquidated damages, and not a penalty. This would clearly be so in all those contracts for the delivery of personal property, which a court of equity would specifically enforce: Lynde v. Thompson, 2 Allen, 460, per Bigelow, C. J.; Gammon v. Howe, 14 Me. 250; Chamberlain v. Bagley, 11 N. H. 234; Mead v. Wheeler, 13 N. H. 351; Tingley v. Cutler, 7 Conn. 291; Shiell v. McNitt, 9 Paige, 101, 103; Clement v. Cash, 21 N. Y. 253; Knapp v. Maltby, 13 Wend. 587; Streeper v. Williams, 48 Pa. St. 450; Hise v. Foster, 17 Iowa, 23; Morse v. Rathburn, 42 Mo. 594, 97 Am. Dec. 359; Williams v. Green, 14 Ark. 315, 327. If, however, the stipulated sum should be excessive in amount, and greatly exceed the value of the property, this would be a strong, even if not conclusive, reason for a court of equity to treat it as a penalty:[g] See Spencer

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(g) **Personal Property — Liquidated Damages.**—Agreement to purchase the stock of a corporation: Leeman v. Edison Electric Illum. Co., 53 N. Y. Supp. 302. Sale of a slave: Tardeveau v. Smith, 3 Ky. (Hardin) 175, lated to be paid upon a violation of any or of all these provisions, such sum must be taken to be a penalty.[1] [a]

§ 444. *Fourth.* Whether an agreement provides for the performance or non-performance of one single act, or of

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v. Tilden, 5 Cow. 144; Haldeman v. Jennings, 14 Ark. 329; Williams v. Green, 14 Ark. 315, 326; Burr v. Todd, 41 Pa. St. 206.

[1] Snell's Equity, 288; Kemble v. Farren, 6 Bing. 141; Davies v. Penton, 6 Barn. & C. 216, 223; Horner v. Flintoff, 9 Mees. & W. 678, 681; Dimick v. Corlett, 12 Moore P. C. C. 199; Trower v. Elder, 77 Ill. 452, and cases cited; First Orthodox Church v. Walrath, 27 Mich. 232; Cook v. Finch, 19 Minn. 407; Morris v. McCoy, 7 Nev. 399; Dullaghen v. Fitch, 42 Wis. 679; Lyman v. Babcock, 40 Wis. 503; Savannah R. R. v. Callahan, 56 Ga. 331; Shreve v. Brereton, 51 Pa. St. 175, 180; Niver v. Rossman, 18 Barb. 50;

3 Am. Dec. 727. In Cummings v. Dudley, 60 Cal. 383, 44 Am. Rep. 58, a provision in a contract to sell horses, where no time was fixed for delivery and no specified horses were agreed upon, was held to be for liquidated damages. A stipulation for liquidated damages for failure to deliver cattle sold has been enforced: Frost v. Foote (Tex. Civ. App.), 44 S. W. 1071; Copeland v. Holman (Tex. Civ. App.), 51 S. W. 257; Millar v. Smith, 28 Tex. Civ. App. 386, 67 S. W. 429. In Maxwell v. Allen, 78 Me. 32, 3 Atl. 386, 57 Am. Rep. 783, a provision in a contract by one partner to sell a stock of goods to another was held to be for liquidated damages.

Penalties.— Agreement for sale of stock or bonds which have a market value: Baird v. Tolliver, 25 Tenn. (6 Humph.) 186, 44 Am. Dec. 298; Graham v. Bickham, 4 Dall. 149, 2 Yeates, 32, 1 Am. Dec. 328. Sale of sheep or cattle: Squires v. Elwood, 33 Neb. 126, 49 N. W. 939; Home Land & Cattle Co. v. McNamara, 111 Fed. 822, 49 C. C. A. 642. Sale of railroad ties: Gulf, C. & S. F. R. Co. v. Ward (Tex. Civ. App.), 34 S. W. 328. Sale of buggies: Mansur & Tebbetts Impl. Co. v. Willet (Okla.), 61 Pac. 1066. Sale of bags: Pacific Factor Co. v. Adler, 90 Cal. 110, 27 Pac. 36, 25 Am. St. Rep. 102. A person to whom is awarded a contract to furnish a city with certain articles of personalty may recover a certified check deposited with the city under a provision of law requiring all bidders to make such deposit, and providing that if the successful bidder shall enter into contract with bond, without delay, his deposit shall be returned, when, without fault on his part, such successful bidder to whom the contract is awarded is unable to procure a surety on his bond, and, for this reason, the contract is subsequently awarded by the city to another bidder for a much smaller sum than the former bid. In such case the deposit must be regarded as a penalty and not as liquidated damages: Willson v. Mayor, 83 Md. 203, 34 Atl. 774, 55 Am. St. Rep. 339.

(a) Quoted in Everett Land Co. v. Maney, 16 Wash. 552, 48 Pac. 243. See Willson v. Love [1896], 1 Q. B. 626 (establishing the rule in its first form); East Moline Plow Co. v. Weir Plow Co., 95 Fed. 250; Smith v. Newell, 37 Fla. 147, 20 South. 249; Monmouth Park Ass'n v. Warren, 55 N. J. L. 598, 27 Atl. 932; Nash v. Hermosilla, 9 Cal. 584, 70 Am. Dec. 676; Iroquois Furnace

several distinct and separate acts, if the stipulation to pay a certain sum of money upon a default is so framed, is of such a nature and effect that it necessarily renders the defaulting party liable in the same amount at all

Jackson v. Baker, 2 Edw. Ch. 471; Cheddick v. Marsh, 21 N. J. L. 363; Whitfield v. Levy, 35 N. J. L. 149; Berry v. Wisdom, 3 Ohio St. 244; Basye v. Ambrose, 28 Mo. 39; Long v. Towl, 42 Mo. 548, 97 Am. Dec. 355.

In the leading case upon this rule (Kemble v. Farren, 6 Bing. 141) the defendant had agreed to act as principal comedian at the plaintiff's theater for four seasons, conforming in all things to the rules of the theater. The plaintiff was to pay the defendant three pounds every night the theater was open, with other terms. The agreement contained a clause that if either of the parties should neglect or refuse to fulfill the said agreement, or any part thereof, or any stipulation therein contained, such party should pay to the other the sum of one thousand pounds, to which sum it was thereby agreed that the damages sustained by such omission should amount, and which sum was thereby declared by the parties to be liquidated and ascertained damages, and not a penalty or penal sum, or in the nature thereof. The breach alleged was that defendant refused to act during the second season. The court held that the sum of one thousand pounds must be taken to be a penalty, as it was not limited to those breaches which were of an uncertain nature and amount. The mere fact, however, that an agreement contains two or more provisions differing in kind and importance does not of itself necessarily bring it within the operation of this rule. If the various acts stipulated to be done are but minor parts of one single whole,— steps in the accomplishment of one single end,— so that the contract is in reality one,

Co. v. Wilkin Mfg. Co., 181 Ill. 582, 54 N. E. 987; Carter v. Strom, 41 Minn. 522, 43 N. W. 394; City of Madison v. American Sanitary Engineering Co. (Wis.), 95 N. W. 1097; Mansur & Tebbetts Impl. Co. v. Tissier Arms & Hdw. Co., 136 Ala. 597, 33 South. 818; Krutz v. Robbins, 12 Wash. 7, 28 L. R. A. 676, 40 Pac. 415, 50 Am. St. Rep. 871; Hooper v. Savannah, etc., R. R. Co., 69 Ala. 529. In City of El Reno v. Cullinane, 4 Okla. 457, 46 Pac. 510, a bond for $1,000 was given with two conditions — one that certain work be commenced by a certain day, the other that the work be completed by a certain day. The court held the provision to be a penalty, saying: "These conditions seem very unequal. It is difficult to see how more than nominal damages could result from a breach of the former, while a breach of the latter might, under certain circumstances, result in very heavy damages. In case the former condition alone had been broken, and the other complied with by a completion of the work in the prescribed time, it would be unconscionable to allow $1,000 as liquidated damages; and this is a powerful argument in support of the presumption that the parties did not intend the sum named as liquidated damages." In Keck v. Bieber, 148 Pa. St. 645, 24 Atl. 170, 33 Am. St. Rep. 846, there were covenants to indemnify plaintiff, to pay a royalty, to fill up certain holes, to use a certain road, etc. One amount was stipulated for in case of breach. The provision was held to events, both when his failure to perform is complete, and when it is only partial, the sum must be regarded as a penalty, and not as liquidated damages.[a] This rule plainly

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then it may properly come under the operation of the second rule as given in the text. See the cases illustrating this position, *ante*, in the note under § 442. A series of decisions by the New York court of last resort deny the correctness of the rule in the form as given in the text and as adopted by the great majority of cases; and insist that the following is its true reading, as derived from the early authorities, viz.: Where a party binds himself to do several things of different degrees of importance, a certain sum of money made payable upon the non-performance of either or any is necessarily a penalty *only when one of these several things agreed to be done is the payment of a sum of money.* Thus in Cotheal v. Talmage, 9 N. Y. 551, 61 Am. Dec. 716, the facts of which are briefly stated in a previous note, Ruggles, J., after quoting the rule in its usual form, and as given in the text, said: "This doctrine, in the cases in which it is asserted, is traced to the cases of Astley v. Weldon, 2 Bos. & P. 346, and Kemble v. Farren, 6 Bing. 141, but I do not understand either of these cases as establishing any such rule. The principle to be deducted from them is, that where a party agrees to do several things, *one of which is to pay a sum of money*, and in case of a failure to perform any or either of the stipulations, agrees to pay a larger sum as liquidated damages, the larger sum is to be regarded in the nature of a penalty; and being a penalty in regard to one of the stipulations to be performed, is a penalty as to all." To the same effect are Clement v. Cash, 21 N. Y. 253, 259; Bagley v. Peddie, 16 N. Y. 470, 69 Am. Dec. 713.[b]

be a penalty. In Wilhelm v. Eaves, 21 Oreg. 194, 27 Pac. 1053, 14 L. R. A. 297, the plaintiff was made manager of defendant's market. There were stipulations on defendant's part as to amount of compensation, as to lease of a restaurant, etc., and on plaintiff's part as to keeping the market clean, open during certain hours, and refraining from incurring certain debts, etc. The contract provided for $200 damages to secure performance of "all and every" of the covenants. The text was cited as authority for holding the provision to be a penalty.

(b) In Wallis v. Smith, L. R. 21 Ch. Div. 243, the English cases were reviewed by Jessel, M. R., and the first form of the rule as stated in the text was rejected, as supported by *dicta* only. The rule of Cotheal v. Talmage was admitted, and it was also admitted, but not decided, that the stipulated sum might be regarded as a penalty when one or more of the breaches provided for was of trifling importance. But in the recent case of Willson v. Love [1896], 1 Q. B. 626, these observations of Jessel, M. R., were expressly overruled, the rule in the first form stated by the author was adopted and made the basis of the decision of the court, and the effect of Wallis v. Smith was limited to its facts, viz., to cases not of penalty, but of the forfeiture of a deposit. The rule may, therefore, be regarded as settled, so far as the English cases are concerned.

(a) Quoted in Heatwole v. Gorrell, 35 Kan. 692, 12 Pac. 135; cited in Gay Mfg. Co. v. Camp, 65 Fed. 794, 13 C. C. A. 137, 25 U. S. App. 134.

rests upon the same grounds as the third, and may be considered a particular application thereof.[1] [b]

§ 445. *Fifth.* Finally, although an agreement may contain two or more provisions for the doing or not doing different acts, still, where the stipulation to pay a certain sum of money upon a default attaches to only one of these provisions, which is of such a nature that there is no certain means of ascertaining the amount of damages resulting from its violation,[1][a] or where all of the provisions are of such a nature that the damages occasioned by their breach cannot be measured, and a certain sum is made payable upon a default generally in any of them,[2][b]— in each of these cases, the sum so agreed to be paid may be considered as liquidated damage, provided, of course, that the language of the stipulation does not bring it within the limitations of the preceding fourth rule. It is evident that this proposition, in both its branches, is identical in substance with the second rule, heretofore given, and rests upon exactly the same grounds. The foregoing rules may be considered as settled by the strong preponderance of judicial authority, and they serve to explain large and important classes of cases. There are undoubtedly numerous instances which cannot be easily referred to either of these rules; and this must be so almost as a matter of necessity. Since agreements are of infinite variety in their objects and in their provisions, and since the question of penalty or liquidated damages is always one of intention, depending upon the terms and circumstances of each particular contract, there must be many agreements which cannot be brought within the scope of any specific rule, and with which a court can only deal by applying the most general canon of interpretation.[3] [c]

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[1] Jemmison v. Gray, 29 Iowa, 537; Lee v. Overstreet, 44 Ga. 507; Hamaker v. Schroers, 49 Mo. 406; Taylor v. The Marcella, 1 Woods, 302; Lyman v. Babcock, 40 Wis. 503; Dallaghen v. Fitch, 42 Wis. 679; Ex parte Pollard, 17 Bank. Reg. 228; Savannah R. R. v. Callaghan, 56 Ga. 331; Shreve v. Brereton, 51 Pa. St. 175; Curry v. Larer, 7 Pa. St. 470, 49 Am. Dec. 486; Perkins v. Lyman, 11 Mass. 76, 6 Am. Dec. 158; Lampman v. Cochran, 16 N. Y. 269, 277. In Jemmison v. Gray, 29 Iowa, 537, the contract was to deliver sixty thousand railroad ties, to be paid for as delivered, but ten per cent of the monthly estimates were to be retained by the buyer as a security for the final completion. This ten per cent was held to be a penalty, and not liquidated damages. In Lee v. Overstreet, 44 Ga. 507, defendant contracted to deliver all the turpentine made on his plantation in lots of forty barrels each, to be paid for on delivery, at the rate of five dollars per barrel, and either party failing was to forfeit one thousand dollars. This sum was held to be a penalty. In Shreve v. Brereton, 51 Pa. St. 175, the contract was similar, to deliver one thousand barrels of petroleum, to be paid for in a specified manner, and the parties bound themselves in the sum of ten thousand dollars, not as a penalty, but as liquidated damages. The court said that the intention could not have been for the vendor to be liable for that large sum when he failed to deliver only one barrel, as much as when he failed to deliver the whole one thousand barrels, and the sum must, therefore, have been meant as a penalty. In Hamaker v. Schroers, 49 Mo. 406, defendant agreed to sell and deliver one hundred grain-drills of a specified kind in a certain time, or be liable to pay sixteen hundred dollars. The court held that to regard this sum as liquidated damages would subject the defendant to the same liability upon failing to deliver only one of the machines as upon failing to deliver them all, and the sum must be treated as a penalty. It should be observed that this rule must always be taken into account in every case where it is sought to apply the second rule of the text, for its effect is necessarily to modify the operation of that rule. In other words, there are many agreements which would otherwise come under the second rule because there is no means of accurately fixing the legal measure of damages resulting from a violation, but which are prevented from so doing, since the liability to pay a certain sum is made to be the same, whether the failure to perform is complete or only partial.

(b) Thus, in Johnson v. Cook, 24 Wash. 274, 64 Pac. 729, a certain sum was stipulated for in case defendant should not complete a house and remove all liens from the property. The case was held to come within the rule stated in the text. See Wibaux v. Grinnell, etc., Co., 9 Mont. 154, 22 Pac. 492.

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[1] Green v. Price, 13 Mees. & W. 695, 16 Mees. & W. 354; Rawlinson v. Clarke, 14 Mees. & W. 187; Shute v. Hamilton, 3 Daly, 462; Mott v. Mott, 11 Barb. 134; Dakin v. Williams, 17 Wend. 447, 22 Wend. 201; Pearson v. Williams, 24 Wend. 244, 26 Wend. 630; Mead v. Wheeler, 13 N. H. 301; Hodges v. King, 7 Met. 583; Lange v. Week, 2 Ohio St. 519; Watts v. Sheppard, 2 Ala. 425, 445.

[2] Atkyns v. Kinnier, 4 Ex. 776-783; Galsworthy v. Strutt, 1 Ex. 659; Hall v. Crowley, 5 Allen, 304, 81 Am. Dec. 745; Chase v. Allen, 13 Gray, 42; Young v. White, 5 Watts, 460; Powell v. Burroughs, 54 Pa. St. 329, 336; O'Donnell v. Rosenberg, 14 Abb. Pr., N. S., 59; Leary v. Laflin, 101 Mass. 334; Dwinel v. Brown, 54 Me. 458; Clement v. Cash, 21 N. Y. 253; Cotheal v. Talmage, 9 N. Y. 551, 61 Am. Dec. 716; Bagley v. Peddie, 16 N. Y. 470, 69 Am. Dec. 713.

(a) Emery v. Boyle, 200 Pa. St. 249, 49 Atl. 779 (*dictum*).

(b) See Wallis v. Smith, L. R. 21 Ch. Div. 243.

§ 446. **No Election to Pay the Penalty and not to Perform.**— With respect to the effect of a penalty upon the equitable rights of the parties, while a court of equity will re-

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[3] In the following cases, not already cited in the former notes, the sum was held to be a *penalty:* Colwell v. Lawrence, 38 N. Y. 71; Green v. Tweed, 13 Abb. Pr., N. S., 427 (excessive amount); Staples v. Parker, 41 Barb. 648; Wallis v. Carpenter, 13 Allen, 19; Long v. Towl, 42 Mo. 545, 97 Am. Dec. 355; Ranger v. Great Western R'y Co., 5 H. L. Cas. 72. And in the following cases the sum was held to be *liquidated damages:* Leggett v. Mut. Life Ins. Co., 50 Barb. 616; Gobble v. Linder, 76 Ill. 157; Ryan v. Martin, 16 Wis. 57; Hise v. Foster, 17 Iowa, 23; Morse v. Rathburn, 42 Mo. 594, 97 Am. Dec. 359; Streeter v. Rush, 25 Cal. 67; Lightner v. Menzel, 35 Cal. 452.

(c) The five rules stated in §§ 441–445 of the text are quoted as proper statements of the established doctrines in Johnson v. Cook, 24 Wash. 274, 64 Pac. 729.

Special rules.— If a stipulation is held to be for liquidated damages, the plaintiff need not prove that he has suffered any damage. Sanford v. First Nat. Bank, 94 Iowa, 680, 63 N. W. 459; Little v. Banks, 85 N. Y. 259. Nor can the defendant show that the actual damage was less than the stipulated amount, it being conceded by the court that the provision is for liquidated damages. May v. Crawford, 150 Mo. 504, 51 S. W. 693. And of course in such a case the plaintiff cannot recover more than the stipulated amount. Morrison v. Ashburn (Tex. Civ. App.), 21 S. W. 993; Darrow v. Cornell, 12 App. Div. 604, 42 N. Y. Supp. 1081; Smith v. Vail, 53 App. Div. 628, 65 N. Y. Supp. 834. If the amount named in the contract be regarded as liquidated damages, it forms the measure of damages, and the jury are confined to it. Hennessy v. Metzger, 152 Ill. 505, 38 N. E. 1058, 43 Am. St. Rep. 267. It has been intimated that where the sum named as liquidated damages is shown to bear no reasonable proportion to the actual, only actual damages can be recovered. Collier v. Betterton, (Tex.) 29 S. W. 468. In such a case, however, the provision is really a penalty, as we have seen before. If it does not appear unreasonable, the stipulated sum will be held to be the measure of damage. Halff v. O'Connor, 14 Tex. Civ. App. 191, 37 S. W. 238. The rule is stated by the supreme court of Nebraska, in the syllabus to Camp v. Pollock, 45 Neb. 771, 64 N. W. 231, as follows: "Where damages are liquidated, and there is no conflict of evidence as to their amount, the court may direct the jury as to the precise amount, and not leave it to the assessment of the jury." Article 1934 of the Revised Civil Code of Louisiana provides: "When the parties by their contract have determined the sum that shall be paid as damages for its breach, the creditor must recover that sum, but is not entitled to more. But when the contract is executed in part, the damages agreed on by the parties may be reduced to the loss really suffered and the gain of which the party has been deprived, unless lieve the party who has thus bound himself against a penalty, or will restrain its enforcement against him at law, it will not, on the other hand, permit such party to resist a specific performance of the contract by electing to pay the penalty. Where a person has agreed to do a certain act, or to refrain from doing a certain act, and has added a penalty for the purpose of securing a performance, a court of equity will, if the contract is otherwise one which calls for its interposition, compel the party to specifically perform, or restrain him from committing the act, as the case may be, notwithstanding the penalty. If the sum stipulated to be paid is really a penalty, the party will never be allowed to pay it, and then treat such payment as a sufficient ground for refusing to perform his undertaking.[1][a] Where, however, the creditor party in such a contract has elected to proceed at law, and has recovered a judgment for damages, he cannot afterwards come into a court of equity, and obtain a specific performance; he cannot have the remedy given by both courts.[2]

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[1] French v. Macale, 2 Dru. & War. 274; Howard v. Hopkins, 2 Atk. 371; Chilliner v. Chilliner, 2 Ves. 528; City of London v. Pugh, 4 Brown Parl. C., Tomlins's ed., 395; Hardy v. Martin, 1 Cox, 26; Logan v. Wienholt, 1 Clark & F. 611, 7 Bligh, N. S., 1, 49, 50; Fox v. Scard, 33 Beav. 327; Hobson v. Trevor, 2 P. Wms. 191; Kennedy v. Lee, 3 Mer. 441, 450; Prebble v. Boghurst, 1 Swanst. 309; Jeudwine v. Agate, 3 Sim. 120, 141; Butler v. Powis, 2 Coll. C. C. 156; Jones v. Heavens, L. R. 2 Ch. Div. 636; In re Dagenham Dock Co., L. R. 8 Ch. 1022; Ewins v. Gordon, 49 N. H. 444; Gillis v. Hall, 7 Phila. 422, 2 Brewst. 342; Dooley v. Watson, 1 Gray, 414; Hooker v. Pynchon, 8 Gray, 550; Fisher v. Shaw, 42 Me. 32; Hull v. Sturdivant, 46 Me. 34; Dailey v. Lichfield, 10 Mich. 29; Whitney v. Stone, 23 Cal. 275; Dike v. Green, 4 R. I. 288, 295. In French v. Macale, 2 Dru. & War. 274, Lord St. Leonards clearly stated this doctrine: "The general rule of equity is, that if a thing be agreed upon to be done, though there is a penalty annexed to secure its performance, yet the very thing itself must be done. If a man, for instance, agrees to settle an estate, and executes his bond for six hundred pounds as a security for the performance of his contract, he will not be allowed to pay the forfeit for his bond, and avoid his agreement, but he will be compelled to settle the

there has been an express agreement that the sum fixed by the contract shall be paid even on a partial breach of the agreement." But in cases where this statute applies, the defendant must affirmatively establish, not only his right to a reduction, but the extent of the reduction. Goldman v. Goldman, 25 South. 555, 51 La. Ann. 761. In Elston v. Roop, 133 Ala. 331, 32 South. 129, it was held that a court is authorized to predicate its finding upon the stipulated amount, even though it be a penalty, in the absence of other evidence.

(a) National Prov. Bank v. Marshall, L. R. 40 Ch. Div. 112; Amanda Consol. G. M. Co. v. People's M. & M. Co., 28 Colo. 251, 64 Pac. 218.

§ 447. Otherwise with Liquidated Damages.— Where, however, the parties to an agreement have added a provision for the payment, in case of a breach, of a certain sum which is truly liquidated damages, and not a penalty,— in other words, where the contract stipulates for one of two things in the alternative, the doing of certain acts, or the payment of a certain amount of money in lieu thereof,— equity will not interfere to decree a specific performance of the first alternative, but will leave the injured party to his remedy of damages at law.[1][a] This

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estate in specific performance of his agreement. So if a man covenants to abstain from doing a certain act, and agrees that if he do it he will pay a sum of money, it would seem that he will be compelled to abstain from doing that act; and just as in the converse case, he cannot elect to break his agreement by paying for his violation of the contract." In Dooley v. Watson, 1 Gray, 414, the doctrine was laid down in equally plain terms by Shaw, C. J.: "Courts of equity have long since overruled the doctrine that a bond for the payment of money, conditioned to be void on the conveyance of land, is to be treated as a mere agreement to pay money. When the penalty appears to be intended merely as a security for the performance of the agreement, the principal object of the parties will be carried out."

[2] Fox v. Scard, 33 Beav. 327, per Sir J. Romilly, M. R.

[1] French v. Macale, 2 Dru. & War. 269; Howard v. Hopkins, 2 Atk. 371; Jones v. Green, 3 Younge & J. 298; Coles v. Sims, 5 De Gex, M. & G. 1; Sainter v. Ferguson, 1 Macn. & G. 286; Rolfe v. Peterson, 2 Brown Parl. C. 436; Woodward v. Gyles, 2 Vern. 119; Magrane v. Archbold, 1 Dow, 107; Ranger v. Great Western R'y Co., 5 H. L. Cas. 73; Shiell v. McNit, 9 Paige, 101; St. Mary's Church v. Stockton, 9 N. J. Eq. 520; Bodine v. Glading, 21 Pa. St. 50, 59 Am. Dec. 749; Holdeman v. Jennings, 14 Ark. 329; Skinner v. Dayton, 2 Johns. Ch. 526; City Bank of Baltimore v. Smith, 3 Gill & J. 265; Jaquith v. Hudson, 5 Mich. 123; Hahn v. Concordia Soc., 42 Md. 460.

(a) Quoted in Amanda Consol. G. M. Co. v. People's M. & M. Co., 28 Colo. 251, 64 Pac. 218. But see Lyman v. Gedney, 114 Ill. 388, 55 Am. Rep. 871, 29 N. E. 282, where the court said: "The mere fact that a contract stipulates for the payment of liquidated damages in case of failure to perform does not prevent a court of equity from decreeing specific performance. It is only where the contract stipulates for one of two things in the alternative — the performance of certain acts, or the pay is one reason among many why courts of equity incline strongly to construe such stipulations as providing for a penalty rather than for liquidated damages.

§ 448. **Forfeiture.**— This subject includes two entirely distinct questions, namely: When will equity interfere to aid the defaulting party, and to relieve against a forfeiture by setting it aside, or by allowing him to go on and perform as though it had not occurred, or by restraining the other party from enforcing it? and when will equity interfere at the suit of the creditor party, and by its decree actively enforce and carry into effect the forfeiture against the one in default? The former of these questions will be examined first in order.

§ 449. **When Equity will Relieve.**[a]— It has been repeatedly assumed and asserted by numerous judicial *dicta,* and the statement seems to have been accepted by many text-writers as correct, that a court of equity is governed by the same doctrine with respect to relief against forfeitures and against penalties. This is true, perhaps, when considered simply as the announcement of a rule in its most

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ment of a certain amount of money in lieu thereof — that equity will not decree a specific performance of the first alternative." See also Augusta Steam Laundry Co. v. Debow, 98 Me. 496, 57 Atl. 845. In Phœnix Ins. Co. v. Continental Ins. Co., 87 N. Y. 400, the court said: "If the primary intention was that the very thing covenanted should be done, then the sum named is in the nature of a penalty to secure the performance of the principal thing; and it can make no difference in the construction of the covenant whether damages for non-performance are left to be ascertained by an issue *quantum damnificatus* or the parties themselves conclusively settle the amount." In this case a party agreed not to build on certain premises, and "for a violation of the covenant" agreed to pay "the sum of $1,500 liquidated damages." In all cases where a party relies on the payment of liquidated damages as a discharge, it must clearly appear that they were to be paid and received absolutely in lieu of performance: Higbie v. Farr, 28 Minn. 439, 10 N. W. 592. In California a contract otherwise proper to be specifically enforced may be thus enforced though the damages are liquidated and the party in default is willing to pay the same: Cal. Civil Code, § 3389. In Solomon v. Diefenthal, 46 La. Ann. 897, 15 South. 183, it was held that a plaintiff cannot recover liquidated damages and have injunctive relief as well.

[a] This section is cited in Manhattan Life Ins. Co. v. Wright (C. C. A.), 126 Fed. 82.

general form; but in its practical application it is subject to such important exceptions and limitation that there is, in fact, a marked distinction between forfeitures and penalties, in the view with which they are respectively regarded and dealt with by equity. We have seen that wherever a certain sum is stipulated to be paid as security for the performance of some act which is capable of pecuniary measurement, so that the compensation in the nature of damages for a non-performance can be ascertained with reasonable exactness, the certain sum is taken to be a penalty, and that courts strongly lean in favor of a construction which shall make it a penalty, so that it may be disregarded. This is not universally true, is not the practical test in case of forfeitures, although, perhaps, the court may use the same general formula of words as applicable to both instances.

§ 450. **Ground and Extent of Such Relief.**— It is well settled that where the agreement secured is simply one for the payment of money, a forfeiture either of land, chattels, securities, or money, incurred by its non-performance, will be set aside on behalf of the defaulting party, or relieved against in any other manner made necessary by the circumstances of the case, on payment of the debt, interest, and costs, if any have accrued, unless by his inequitable conduct he has debarred himself from the remedial right, or unless the remedy is prohibited, under the special circumstances of the case, by some other controlling doctrine of equity.[1] [a] Where the stipulation, however, is

[1] Hill v. Barclay, 16 Ves. 403, 405, 18 Ves. 58, 60; Reynolds v. Pitt, 19 Ves. 140; Wadman v. Calcraft, 10 Ves. 68, 69; Bowser v. Colby, 1 Hare, 128; Gregory v. Wilson, 9 Hare, 683; Bracebridge v. Buckley, 2 Price, 200; Skinner v. Dayton, 2 Johns. Ch. 535, 17 Johns. 339; Hagar v. Buck, 44

(a) Quoted in Tibbetts v. Cate, 66 N. H. 550, 22 Atl. 559, and cited generally in Attala Min. & Mfg. Co. v. Winchester, 102 Ala. 184, 14 South. 565; Manhattan Life Ins. Co. v. Wright, (C. C. A.), 126 Fed. 82. See Noyes v. Anderson, 124 N. Y. 175, 26 N. E. 316, 21 Am. St. Rep. 657 (citing § 450 of the text); Sunday Lake Min. Co. v. Wakefield, 72 Wis. 204, 39 N. W. 136; Jones v. Bennet, 39 Ky. (9 Dana) 333.

intended to secure the performance or non-performance of some act *in pais*, it is impossible to lay down any such general rule with which all the classes of decisions shall harmonize. It is certain that if the act is of such a nature that its value cannot be pecuniarily measured, if the compensation for a default cannot be ascertained and fixed with reasonable precision, relief against the forfeiture incurred by its non-performance will not, under ordinary circumstances, be given.[2] [b] The affirmative of this proposition cannot be stated as a rule with the same generality. It has, indeed, been said that equity would relieve against forfeitures in all cases where compensation can be made; but this is clearly incorrect. It is well settled that a court of equity will not, under ordinary circumstances, set aside forfeitures incurred on the breach of many covenants contained in leases, or of stipulations in other agreements, although the compensation for the resulting injury could be ascertained without difficulty;[3] and on the other hand,

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Vt. 285, 8 Am. Rep. 368; Hancock v. Carlton, 6 Gray, 39; Carpenter v. Westcott, 4 R. I. 225; Thompson v. Whipple, 5 R. I. 144; Walker v. Wheeler, 2 Conn. 229; Hart v. Homiler, 20 Pa. St. 348; Bright v. Rowland, 3 How. (Miss.) 398; Moore v. Platte, 8 Mo. 467; Walling v. Aiken, 3 McMull. Eq. 1; Royan v. Walker, 1 Wis. 527; Giles v. Austin, 38 N. Y. Sup. Ct. 215, 62 N. Y. 486; Orr v. Zimmerman, 63 Mo. 72; Palmer v. Ford, 70 Ill. 369.

[2] Gregory v. Wilson, 9 Hare, 683; Hills v. Rowland, 4 De Gex, M. & G. 430; Croft v. Goldsmid, 24 Beav. 312; Nokes v. Gibbon, 3 Drew. 618; White v. Warner, 2 Mer. 459; Skinner v. Dayton, 2 Johns. Ch. 526, 535; Baxter v. Lansing, 7 Paige, 350; Drenkler v. Adams, 20 Vt. 415; Clarke v. Drake, 3 Chand. 253; Gregg v. Landis, 19 N. J. Eq. 850, 21 N. J. Eq. 494, 511; Ottawa Plank Road Co. v. Murray, 15 Ill. 336.

[3] White v. Warner, 2 Mer. 459; Eaton v. Lyon, 3 Ves. 692, 693; Hill v. Barclay, 16 Ves. 403, 405, 18 Ves. 58–64; Rolfe v. Harris, 2 Price, 206, note; Brace-

(b) In Klein v. New York Life Ins. Co., 104 U. S. 88, it was held that equity will not relieve against a forfeiture of a life insurance policy for non-payment of premiums. The court said: "If the payment of the premiums, and their payment on the day they fall due, are of the essence of the contract, so is the stipulation for the release of the company from liability in default of punctual payment. No compensation can be made a life insurance company for the general want of punctuality among its patrons." See also Iowa Life Ins. Co. v. Lewis, 187 U. S. 335, 23 Sup. Ct. 126; Knickerbocker Life Ins. Co. v. Dietz, 52 Md. 16; Manhattan Life Ins. Co. v. Wright, (C. C. A.), 126 Fed. 82.

the relief is often given, as will appear from subsequent paragraphs, where the agreement secured by the clause of forfeiture is not one expressly and simply for the payment of money. The following proposition seems to be a conclusion fairly drawn from all the decisions upon the subject, and to be an accurate and comprehensive statement of the general doctrine as settled by them, namely: In the absence of special circumstances giving the defaulting party a higher remedial right, a court of equity will set aside or otherwise relieve against a forfeiture, both when it is incurred on the breach of an agreement expressly and simply for the payment of money, and also on the breach of an agreement of which the obligation, although indirectly, is yet substantially a pecuniary one.[4]

§ 451. **Forfeiture Occasioned by Accident, Fraud, Surprise, or Ignorance.**— There are, as intimated above, special circumstances which will entitle a defaulting party to relief against a forfeiture in cases where otherwise it would not be granted. Although the agreement is not one measurable by a pecuniary compensation, still, if the party bound by it has been prevented from an exact fulfillment, so that a forfeiture is incurred, by unavoidable accident, by fraud, by surprise, or by ignorance, not willful, a court of equity will interpose and relieve him from the forfeiture so caused, upon his making compensation, if necessary, or doing everything else within his power.[1] [a] Also, in the same class of

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bridge v. Buckley, 2 Price, 200; Green v. Bridges, 4 Sim. 96; Hills v. Rowland, 4 De Gex, M. & G. 430; Germantown, etc., R'y v. Fitler, 60 Pa. St. 131, 100 Am. Dec. 546; Dunklee v. Adams, 20 Vt. 415, 50 Am. Dec. 44.

[4] This mode of formulating the doctrine is in harmony with all the decisions, although it does not go as far as some of the *dicta*. See the cases cited in the preceding notes.

[1] Many of the cases under this doctrine are those of covenants in leases, but

(a) Cited with approval in North Jersey St. R'y Co. v. Inhabitants of Tp. of South Orange, 58 N. J. Eq. 83, 43 Atl. 53; Noyes v. Anderson, 124 N. Y. 175, 26 N. E. 316, 21 Am. St. Rep. 657. In the latter case the plaintiff agreed not to foreclose a mortgage during defendant's lifetime, provided defendant should pay all taxes within thirty days from time of accrual. Defendant did not pay one assessment in time because she did cases, and upon the same equitable grounds, if there has been a breach of the agreement sufficient to cause a forfeiture, and the party entitled thereto, either expressly or by

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the doctrine, of course, extends to all agreements:[b] Eaton v. Lyon, 3 Ves. 693, per Lord Alvanley; Hill v. Barclay, 18 Ves. 58, 62, per Lord Eldon; Hannam v. South London Water Co., 2 Mer. 61; Bamford v. Creasey, 3 Giff. 675; Wing v. Harvey, 5 De Gex, M. & G. 265; Duke of Beaufort v. Neeld, 12 Clark & F. 248; Bridges v. Longman, 24 Beav. 27; Meek v. Carter, 6 Week. Rep. 852. In Hill v. Barclay, 18 Ves. 58, Lord Eldon was very strongly opposed to granting relief in ordinary cases, but he expressly says that his reasoning and conclusions do not apply to cases of accident, surprise, fraud, etc.; as, for example, the forfeiture arising from a lessee's breach of a covenant to repair, the effect of the weather in preventing him, or if a permissive want of repair, the landlord standing by and looking on and not objecting. Wing v. Harvey, 5 De Gex, M. & G. 265, is a good illustration. A life policy contained a condition making it void if the assured went beyond Europe without a license. The assured assigned the policy and took up his residence in Canada. The assignee, on paying the annual premium to an agent of the insurance company, informed him that the assured was residing in Canada. The agent answered that this would not avoid the policy, and continued to receive the premiums without objection until the assured died. Although no license had been given, the lord justice held that the company could not insist upon the forfeiture; the assignee had been misled by the company's agent, and to enforce the forfeiture would be a "surprise," even if not an actual fraud.

not know of it, but she eventually paid. It was held that equity would relieve her from the forfeiture. In Tibbets v. Cate, 66 N. H. 550, 22 Atl. 559, a forfeiture was provided for in case of failure to pay all taxes. The court held that relief would be awarded against a forfeiture incurred for non-payment of taxes of which the devisee was ignorant. In Lundin v. Schoeffel, 167 Mass. 465, 45 N. E. 933, there was a provision for a forfeiture of a lease in case of noise in making repairs which should disturb the performance in a theater. The court found that the noise made was slight, lasted only a minute, and that plaintiff did not know that a performance was going on at the time. Injunctive relief was given "on the ground of accident or mistake." In Mactier v. Osborn, 146 Mass. 399, 15 N. E. 641, 4 Am. St. Rep. 323, a lessee agreed to keep the property insured so that the loss would be payable to the lessor. An assignee renewed the insurance, but through mistake the loss was not made payable to the lessor. It was held that equity would relieve from the forfeiture.

That a lessee's mere forgetfulness of a covenant in his lease is not a mistake which can be relieved against, see Barrow v. Trustees [1891], 1 Q. B. 417.

See also, in general, Kopper v. Dyer, 59 Vt. 477, 12 Atl. 4, 59 Am. Rep. 742; Hulett v. Fairbanks, 40 Ohio St. 233 (fraud); Travelers' Ins. Co. v. Brown (Ala.), 35 South. 463; and §§ 826, 833, *post*.

(b) Cited to this effect in Hukill v. Myers, 36 W. Va. 639, 15 S. E. 151.

his conduct, waives it or acquiesces in it, he will be precluded from enforcing the forfeiture, and equity will aid the defaulting party by relieving against it, if necessary.[2] [c] For a like reason a court of equity may set aside or disregard a forfeiture occasioned by a failure to comply with the very letter of an agreement when it has nevertheless been substantially performed.[3] [d]

§ 452. **Forfeiture Willful or through Negligence.**— While a defaulting party may thus acquire a right to the equitable relief from the conduct of the other party, he may also lose the right, which otherwise would have existed, as a consequence of his own conduct. In a case where an agreement creates a mere pecuniary obligation, so that a forfeiture incurred by its breach would ordinarily be set aside, a court of equity will refuse to aid a defaulting party, and relieve against a forfeiture, if his violation of the contract was the result of gross negligence, or was willful and persistent. He who asks help from a court of equity must himself be free from inequitable conduct with respect to the same subject-matter.[1] [a] Having thus exhibited the doctrine in its general form, I shall briefly describe the most important instances of its application, namely: to conditions and covenants in leases; to conditions in contracts for the sale of land; to particular stipulations in other contracts; to the forfeiture of shares of stock; and to forfeitures created by statute.

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[2] In many such cases there would be no need of an appeal to equity, since the breach and forfeiture would be waived at law. Most of the decided cases have arisen from breaches of covenants in leases, but the rule applies as well to all other agreements: Bridges v. Longman, 24 Beav. 27; Croft v. Lumbly, 5 El. & B. 648; Hughes v. Metropolitan R'y Co., L. R. 2 H. L. 439; Wing v. Harvey, 5 De Gex, M. & G. 265; Lilly v. The Fifty Associates, 101 Mass. 432; Helme v. Philadelphia Ins. Co., 61 Pa. St. 107, 100 Am. Dec. 621; Gregg v. Landis, 19 N. J. Eq. 356, 21 N. J. Eq. 494, 507.

[3] Hagar v. Buck, 44 Vt. 285, 8 Am. Rep. 368.

(c) See Robinson v. Cheney, 17 Neb. 673, 24 N. W. 378; Hurst v. Thompson, 73 Ala. 158. See also *ante*, § 439, note. In Pokegama Sugar Pine Lumber Co. v. Klamath River L. & I. Co., 96 Fed. 34, a lessor allowed the lessee to spend a large sum of money on the property after facts sufficient to constitute a forfeiture had occurred. The court held that the forfeiture was waived.

(d) Thus, in Bliley v. Wheeler, 5 Colo. App. 287, 38 Pac. 603, one party claimed a forfeiture for non payment of an installment of $17, after having received nearly $300. There was some dispute as to whether the $17 was due. The court granted relief, saying that "courts, in such cases, do not look complacently, under such circumstances, upon what might be a technical forfeiture at law, but clearly inequitable in a case of this kind."

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[1] Hancock v. Carlton, 6 Gray, 39; Clarke v. Drake, 3 Chand. 223; Horsburg v. Baker, 1 Pet. 236. In Hancock v. Carlton, 6 Gray, 39, land had been conveyed, subject to certain mortgages which the grantee assumed to pay, and "on condition that the grantor should be indemnified and saved harmless." This condition having been broken and a forfeiture thereby incurred, the grantee brought suit in equity to set it aside. It appeared that the grantor had been compelled by due process of law to pay the mortgages, that he had duly notified the grantee (the plaintiff) of these legal proceedings, and required him to pay the mortgages, but the plaintiff had refused to do so. Upon these facts it was held that the plaintiff was not entitled to relief against the forfeiture thus occasioned, although in refusing to pay he had acted under a mistaken view as to his own liability. It may be doubted, I think, whether the court did not push the doctrine of the text too far, since the breach was not in any true sense willful.

(a) See also § 856, note. The supreme court of California in Parsons v. Smilie, 97 Cal. 647, 32 Pac. 702, in construing section 3275 of the Civil Code, held that "willful" forfeiture simply means one voluntarily incurred. In that case an estate was forfeited for breach of condition subsequent in not maintaining a lumber yard. Relief against the forfeiture was denied. In N. Y. & N. E. R. R. Co. v. City of Providence, 16 R. I. 746, 19 Atl. 759, a city had granted to a railroad certain easements upon condition that certain land was to be filled in. The grantee failed to perform, whereupon the city took possession and made the filling. Thirty years later relief was sought on the ground that the city could be compensated. Relief was refused. The case of South Penn Oil Co. v. Edgell, 48 W. Va. 348, 37 S. E. 596, 86 Am. St. Rep. 43, seems hardly in accord with the general rule as laid down in the text. By the contract Mrs. Edgell was entitled to certain gas free, and in case of breach a forfeiture was provided for. The officers of the oil company overlooked this, demanded payment, and upon refusal shut off the supply. Mrs. Edgell declared a forfeiture, whereupon the company sued to set it aside. Speaking of the failure to observe the contract, the court said: "This was a matter of plain negligence on the part of some of the officers or counselors of the appellees, for they had possession of a copy of the contract, and by proper diligence could have been fully informed of its contents." "The breach in the case came from a negligent mistake, but it was not willful in a legal sense. To be so it must be knowingly committed." The court held that relief would be granted because "the gas was a rental consideration easily ascertainable in money." See monographic note on

§ 453. **Forfeitures Arising from Covenants in Leases.**— Where a lease contains a condition that the lessor may re-enter and put an end to the lessee's estate, or even that the lease shall be void, upon the lessee's failure to pay the rent at the time specified, it is well settled that a court of equity will relieve the lessee and set aside a forfeiture incurred by his breach of the condition, whether the lessor has or has not entered and dispossessed the tenant. This rule is based upon the notion that such condition and forfeiture are intended merely as a security for the payment of money.[1] [a]

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[1] By the original doctrine of equity, the relief might be granted within any reasonable time after a breach, and even after an ejectment; by the English statute, the suit in equity must be brought within six months after the lessor has recovered a judgment in an action of ejectment: Bowser v. Colby, 1 Hare, 109, 128, 130–132; Horne v. Thompson, 1 Sausse & S. 615; Hill v. Barclay, 16 Ves. 403, 405, 18 Ves. 58–64; Eaton v. Lyon, 3 Ves. 692, 693; White v. Warner, 2 Mer. 459; Bracebridge v. Buckley, 2 Price, 200; Reynolds v. Pitt, 19 Ves. 140; Atkins v. Chilson, 11 Met. 112; Sanborn v. Woodman, 5 Cush. 360; Stone v. Ellis, 9 Cush. 55; Palmer v. Ford, 70 Ill. 369.

If, however, the lessee has also broken other covenants besides the one for rent, by reason of which he would be liable to an eviction, and against which no relief could be given, then a court of equity will not set aside the forfeiture incurred by a violation of the condition concerning rent, since such relief would be wholly nugatory: Bowser v. Colby, 1 Hare, 109; Horne v. Thompson, 1 Sausse & S. 615; Wadman v. Calcraft, 10 Ves. 67; Davis v. West, 12 Ves. 475; Nokes v. Gibbon, 3 Drew. 693.

the subject of relief from forfeitures in 86 Am. St. Rep. 48.

(a) Quoted in Sunday Lake Min. Co. v. Wakefield, 72 Wis. 204, 39 N. W. 136. In the case of Lundin v. Schoeffel, 167 Mass. 465, 45 N. E. 933, one breach consisted in the tenant's not fitting up the premises promptly. The court said: "If the lessee's failure had been an omission to pay rent promptly as it became due, it is plain that a court of equity might relieve against a forfeiture on this ground, though the omission was even willful. But the lessee's failure in this case was merely an omission to do promptly something which was only useful to the lessors by way of security for the future payment of rent. It was not like a case where the omission caused a present injury or increase of risk to the lessors, as in the case of waste, non-repair, or non-insurance. In such a case a court of equity is not required to refuse relief against a forfeiture, but may look into the circumstances, and determine whether, on the whole, it is just and right that such relief should be granted."

The text is cited in Attala Min. & Mfg. Co. v. Winchester, 102 Ala. 184, 14 South. 565. See, also, Johnson v. Lehigh Val. Traction Co., 130 Fed. 932.

§ 454. Equity will not, under ordinary circumstances, relieve against a forfeiture arising from the breach of other covenants contained in a lease, on the ground that no exact compensation can be made. Among these covenants for a breach of which no relief can ordinarily be given is that to repair generally, or to make specific repairs, or to lay out a certain sum of money in repairs or erections within a specified time;[1] the covenant to insure;[2] the covenant not to assign without license;[3] [a] and in other covenants of a special nature.[4] [b] It should be observed, however, that in all cases of this class relief may be given when the breach was the result of fraud, mistake, accident, surprise, and the like, or was acquiesced in or waived by the lessor.[5]

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[1] Gregory v. Wilson, 9 Hare, 683, 689; Nokes v. Gibbon, 3 Drew. 681; Hill v. Barclay, 16 Ves. 403, 406, 18 Ves. 58, 61, per Lord Eldon; Bracebridge v. Buckley, 2 Price, 215; Croft v. Goldsmid, 24 Beav. 312; the earlier cases of Hack v. Leonard, 9 Mod. 90, per Lord Macclesfield, and Sanders v. Pope, 12 Ves. 282, 290, per Lord Erskine, which laid down a different rule, have been overturned by the subsequent authorities above cited.

[2] Gregory v. Wilson, 9 Hare, 683; Green v. Bridges, 4 Sim. 96; Reynolds v. Pitt, 19 Ves. 134; Bracebridge v. Buckley, 2 Price, 218; White v. Warner, 2 Mer. 459; Havens v. Middleton, 10 Hare, 641. An English statute authorizes the court to relieve against forfeiture incurred by a breach of a covenant to insure, in certain specified cases; 22 & 23 Vict., chap. 35, §§ 4, 6, 7, 8.

[3] Hill v. Barclay, 18 Ves. 36, per Lord Eldon; Wafer v. Mocate, 9 Mod. 112; Wadman v. Calcraft, 10 Ves. 67; Lovat v. Lord Ranelagh, 3 Ves. & B. 24; Bracebridge v. Buckley, 2 Price, 200, 221; Baxter v. Lansing, 7 Paige, 350. But in Grigg v. Landis, 21 N. J. Eq. 494, 514, it was held that a clause in a contract of sale that the vendee should not assign did not come within the meaning and operation of this rule.

[4] To cultivate the land in a husbandlike manner: Hills v. Rowland, 4 De Gex, M. & G. 430; not to carry on a particular trade: Macher v. Foundling Hospital, 1 Ves. & B. 187; not to suffer persons to use a private way over part of the land leased: Descarlett v. Dennett, 9 Mod. 22.

(a) See also Barrow v. Trustees [1891], 1 Q. B. 417 (covenant against underletting).

(b) In Monroe v. Armstrong, 96 Pa. St. 307, there was a covenant for forfeiture in case of delay in working under an oil lease. The court said: "Forfeiture for non-development or delay, is essential to private and public interests in relation to the use and alienation of property. In such cases as this, equity follows the law. In general, equity abhors a forfeiture, but not when it works equity and protects a landowner from the laches of a lessee whose lease is of no value till developed, except for a purpose foreign to the agreement." See also Hukill v. Guffey, 37 W. Va. 425, 16 S. E. 544.

§ 455. **From Contracts for the Sale of Land.**— Where an ordinary contract for the sale of land is so drawn that the vendee's estate, interest, and rights under it are liable to be forfeited and lost upon his failure to pay the price at the time specified, the question whether equity will relieve him ought to be a very plain and simple one; but in the face of the authorities, it is impossible to be answered in any general and certain manner. To examine this question in detail would require me to anticipate the full discussion of the doctrine concerning time as the essence of contracts in their specific enforcement. I shall therefore simply state the general conclusion derived from the decided cases. It is well settled that where the parties have so stipulated as to make the time of payment of the essence of the contract, within the view of equity as well as of the law, a court of equity cannot relieve a vendee who has made default.[a] With respect to this rule there is no doubt; the only difficulty is in determining when time has thus been made essential. It is also equally certain that when the contract is made to depend upon a condition precedent,— in other words, when no right shall vest until certain acts have been done, as, for example, until the vendee has paid certain sums at certain specified times,— then, also, a court of equity will not relieve the vendee against the forfeiture incurred by a breach of such condition precedent.[b] But when, on the other hand, the stipulation concerning payment is only a condition subsequent, a court of equity has power to relieve the defaulting vendee from the forfeiture caused by his breach of this condition, upon his paying the amount due, with interest, because the clause of forfeiture may be regarded as simply a security for the payment.[c] It is therefore held, in a great number of cases, that the forfeiture provided for by such a clause, on the failure of the purchaser to fulfill at the proper time, will be disregarded and set aside by a court of equity, unless such failure is intentional or willful. This conclusion is in plain accordance with the general doctrine of equity in relation to relief against forfeitures; but it cannot be regarded as a universal rule. Under exactly these circumstances many American decisions have treated such a clause as rendering the stipulated time of payment essential, and as therefore binding according to its letter, and have refused to give any relief.[1]

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[5] See *ante*, § 451, and cases in note.

(a) See Talkin v. Anderson (Tex.), 19 S. W. 852; Sanders v. Carter, 91 Ga. 450, 17 S. E. 345; Aikman v. Sanborn (Cal.), 52 Pac. 729; Allison v. Dunwody, 100 Ga. 51, 28 S. E. 651; Drown v. Ingels, 3 Wash. St. 424, 28 Pac. 759; Moore v. Durnam, 63 N. J. Eq. 96, 51 Atl. 449; Bucklen v. Hasterlik, 155 Ill. 423, 40 N. E. 561; Womack v. Coleman (Minn.), 93 N. W. 663; Keefe v. Fairfield (Mass.), 68 N. E. 342. The California rule is well discussed in Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 69 Am. St. Rep. 17, 55 Pac. 713, 43 L. R. A. 199. This section of the text is quoted with approval, and earlier California cases, especially Drew v. Pedlar, 87 Cal. 443, 25 Pac. 749, 22 Am. St. Rep. 257, are distinguished. See also Equitable Loan & Security Co. v. Waring, 117 Ga. 599, 44 S. E. 320, 97 Am. St. Rep. 176. It has been held, in a few cases, however, that if the damages can be ascertained, relief will be awarded even in case of a forfeiture in a contract for the sale of land. Barnes v. Clement, 12 S. D. 270, 81 N. W. 301; Easton v. Cressey, 100 Cal. 75, 34 Pac. 622; Allison v. Cocke's Ex'rs, 106 Ky. 763, 51 S. W. 593. A party who is unable to show a good title cannot insist upon a forfeiture: Tharp v. Lee, 25 Tex. Civ. App. 439, 62 S. W. 93.

§ 456. **From Other Contracts.**— In all other special contracts containing provisions for a forfeiture, the same general principle must, of course, be applied, although there may be some doubt or difficulty in the application. It is clear that if the contract be of such a nature that a clause for the payment of a certain sum upon its violation would be pronounced a provision for liquidated damages, then a court of equity would grant no relief against a forfeiture incurred by its non-performance. On the other hand, if the obligation created by the contract is substantially, though perhaps indirectly, a pecuniary one, then a court of equity undoubtedly will aid the defaulting party by setting aside a forfeiture. Between these two extremes there is a mass of agreements with respect of which the action of the courts in giving relief may perhaps be regarded as somewhat discretionary. The mere fact that a certain sum stipulated to be paid upon a violation would be treated as a penalty is not of itself decisive in favor of a relief from forfeiture in similar cases. The examples given in the note will serve to illustrate the action of courts in dealing with such agreements.[1] [a]

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[1] See Pomeroy on Specific Performance, §§ 335, 336, 379; Wells v. Smith, 2 Edw. Ch. 78, 7 Paige, 22, 24; Edgerton v. Peckham, 11 Paige, 352, 359; Sanborn v. Woodman, 5 Cush. 36; Decamp v. Feay, 5 Serg. & R. 323, 326, 9 Am. Dec. 372; Remington v. Irwin, 14 Pa. St. 143, 145; Jones v. Robbins, 29 Me. 361, 50 Am. Dec. 593; Clark v. Lyons, 25 Ill. 105; Snyder v. Spaulding, 57 Ill. 480, 484; McClartey v. Gokey, 31 Iowa, 505; Steele v. Branch, 40 Cal. 3; Farley v. Vaughn, 11 Cal. 227; Royan v. Walker, 1 Wis. 527; as examples of cases where court has refused to interfere, see Benedict v. Lynch, 1 Johns. Ch. 370, 7 Am. Dec. 484; Grey v. Tubbs, 43 Cal. 359. Such decisions as these seem to ignore the equitable principle of relief from penalties and forfeitures.

(b) Quoted in Woods v. McGraw, (C. C. A.), 127 Fed. 914.

(c) Cited to this effect in Donnelly v. Eastes, 94 Wis. 390, 69 N. W. 157.

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[1] In Steele v. Branch, 40 Cal. 3, a contract for the sale of land contained a condition that if the vendee did not pay off a mortgage upon the premises when it fell due, the contract should be void and the land revert to the vendor. This condition was held to be a security for the performance of an obligation simply pecuniary, and the vendee was relieved from the forfeiture occasioned by its default. In Gregg v. Landis, 19 N. J. Eq. 850, 21 N. J. Eq. 494, 514, the question was carefully examined. A contract for the sale of land stipulated that the vendee should plant shade-trees in a specified manner before a certain date, should erect a house for occupation within a year, and should bring at least two and a half acres under cultivation every year, and in default of any of these provisions the vendor should be entitled to take back the land, etc. The court held that the forfeiture caused by the vendee's non-performance could not be set aside. In City Bank v. Smith, 3 Gill & J. 265, a contract con-

(a) In Sanford v. First Nat. Bank of Belle Plaine, 94 Iowa, 680, 63 N. W. 459, relief was refused against a forfeiture contained in an agreement of partnership. Relief has been refused to an employee who agreed to a forfeiture of a definite amount of wages in case of a breach of the contract of employment. Tennessee Mfg. Co. v. James, 91 Tenn. (7 Pickle) 154, 18 S. W. 262, 30 Am. St. Rep. 865, 15 L. R. A. 211. But, on the other hand, where the agreement provided for a forfeiture of all wages in case of the employee leaving without notice, the stipulation has been held unreasonable and relief granted. Schmieder v. Kingsley, 6 Misc. Rep. 107, 26 N. Y. Supp. 31; affirmed, 7 Misc. Rep. 744, 27 N. Y.

§ 457. Of Shares of Stock.— A forfeiture of the shares of stock in a corporation, regularly and duly incurred by the stockholder's or subscriber's failure to pay the calls or installments thereon according to the charter or by-laws

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cerning lottery tickets provided that no holder of a ticket should be entitled to a prize unless he presented his claim within a year; and it was held that the presentation within a year was thus made a condition precedent, and a court could not relieve a ticket-holder who had failed to comply with this requirement. See also, as to conditions precedent in contracts, Flagg v. Munger, 9 N. Y. 483, 500; Faunce v. Burke, 16 Pa. St. 469, 55 Am. Dec. 519. In Henry v. Tupper, 29 Vt. 358, where a deed was conditioned for the performance of a covenant by the grantee to maintain the grantor with food and lodging, it was held that equity would relieve the grantee from a forfeiture occasioned by his unintentional non-performance. The opinion in this case is able and instructive, and contains an exhaustive review of the decisions, English and American. It was said that whether relief would be granted or not in such cases was discretionary with the court. See also Dunklee v. Adams, 20 Vt. 421, 50 Am. Dec. 44; Austin v. Austin, 9 Vt. 420; Hagar v. Buck, 44 Vt. 285, 8 Am. Rep. 368.

Supp. 1124. In Woodbury v. Turner, Day & Woolworth Mfg. Co., 96 Ky. 459, 29 S. W. 295, relief was refused against a forfeiture in a contract for the sale of a business. It has been held that no relief can be had against a forfeiture of a partnership interest for violation of an agreement not to use liquor in excess. Henderson v. Murphree, 109 Ala. 556, 20 South. 45. In Eureka Light & Ice Co. v. City of Eureka (Kan. App.), 48 Pac. 935, a street railway company deposited a sum of money to be forfeited in case of failure to comply with a municipal ordinance. The court refused to relieve. But in Wilson v. Mayor, etc., of Baltimore, 83 Md. 203, 55 Am. St. Rep. 339, 34 Atl. 774, a deposit with a municipal corporation to secure the fulfillment of a contract for supplies was held to be a penalty, and a recovery of the amount so deposited was allowed. In Fessman v. Seeley (Tex. Civ. App.), 30 S. W. 268, the plaintiff had paid a sum for the schooling of his boy. The boy behaved in such a manner as to warrant expulsion, and the plaintiff thereupon sued to recover the amount paid. It was held that he was not entitled to this relief. Forfeiture of a life insurance policy for non-payment of premiums at a stipulated time will not be relieved against. Klein v. New York Life Ins. Co., 104 U. S. 88; Knickerbocker Life Ins. Co. v. Dietz, 52 Md. 16; Iowa Life Ins. Co. v. Lewis, 187 U. S. 335, 23 Sup. Ct. 126; Manhattan Life Ins. Co. v. Wright, (C. C. A.), 126 Fed. 82. In Gates v. Parmly, 93 Wis. 294, 66 N. W. 253, 67 N. W. 739, a vendor who had deeded property agreed to forfeit half the purchase price if he should not show a good title. The court held the amount to be excessive and granted relief. In Nichols v. Haines, 98 Fed. 692, 39 C. C. A. 235, a provision for forfeiture of a deposit for non-performance of a contract to purchase a crop of oranges was held to be such that the court would grant relief, the damages being capable of ascertainment. And see Kerslake v. McInnis, 113 Wis. 659, 89 N. W. 895.

of the company, will not be set aside or relieved against by a court of equity; and the same is true of a forfeiture of public and governmental stock by reason of a failure to comply with the terms of the loan concerning payment.[1][a]

§ 458. **When Imposed by Statute.**— Finally, whenever any forfeiture is provided for by a statute, to be incurred on the doing or not doing some specified act, equity can afford no relief from it, and the same is true of a statutory penalty. A court of equity has no power to disregard or set aside the express terms of statutory legislation, however much it may interfere with the operation of common-law rules.[1][a]

§ 459. **Equity will not Enforce Forfeitures.**— The second question which it was proposed to consider is, When will a court of equity by its decree actively enforce or carry into effect a forfeiture? The general answer to this question is easy and clear. It is a well-settled and familiar doctrine that a court of equity will not interfere on behalf

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§ 457, [1] Sparks v. Company, etc., of Liverpool Water Works, 13 Ves. 428, 433, 434, per Sir William Grant, M. R.; Pendergast v. Turton, 1 Younge & C. Ch. 98, 110–112; Naylor v. South Devon R'y Co., 1 De Gex & S. 32; Sudlow v. Dutch, etc., R'y Co., 21 Beav. 43; Germantown R'y, etc. v. Fitler, 60 Pa. St. 124, 131, 90 Am. Dec. 546; Small v. Herkimer Mfg. Co., 2 N. Y. 335. Of course, if there is any fraud or other inequitable or illegal conduct in the proceedings by which the calls are made or the shares are condemned, equity may, *on that ground*, relieve the stockholder or subscriber from the forfeiture, either by enjoining the proceedings of the corporation officials, or by setting them aside if they have been completed.

§ 458, [1] Peachy v. Duke of Somerset, 1 Strange, 447, 452–456; Keating v. Sparrow, 1 Ball & B. 373; Powell v. Redfield, 4 Blatchf. 45.

§ 457, (a) Burham v. S. F. Fuse Mfg. Co., 76 Cal. 26, 17 Pac. 339; Southern B. & L. Ass'n v. Anniston L. & T. Co., 101 Ala. 582, 29 L. R. A. 120, 15 South. 123, 46 Am. St. Rep. 138 (forfeiture of stock in building and loan association).

§ 458, (a) This paragraph is quoted in State v. McBride, 76 Ala. 51; cited with approval in State v. Hall, 70 Miss. 678, 13 South. 39. In this case the court held that equity "should have given full relief by following the law and enforcing the penalty." See also McCreary v. First Nat. Bank, 109 Tenn. 128, 70 S. W. 821. But in Mississippi R. Com. v. Gulf & S. I. R. Co., 78 Miss. 750, 29 South. 789, a state railroad commission brought a bill to enforce a penalty against a railroad for charging excessive rates. The court refused to enforce, and held that the state cannot compel chancery to take jurisdiction in such a case.

See Clark v. Barnard, 108 U. S. 436, 2 Sup. Ct. 878, and cases cited; Smith v. Mariner, 5 Wis. 551, 68 Am. Dec. 73.

of the party entitled thereto, and enforce a forfeiture, but will leave him to his legal remedies, if any, even though the case might be one in which no equitable relief would be given to the defaulting party against the forfeiture.[a] The few apparent exceptions to this doctrine

(a) Quoted in McClellan v. Coffin, 93 Ind. 456; Olden v. Sassman (N. J. Eq.), 57 Atl. 1075; Moberly v. City of Trenton (Mo.), 81 S. W. 169. Cited with approval in Donnelly v. Eastes, 94 Wis. 390, 69 N. W. 157; Michigan Pipe Co. v. Fremont Ditch, Pipe Line & Reservoir Co., 111 Fed. 284, 49 C. C. A. 324; Worthington v. Moon, 53 N. J. Eq. 46, 30 Atl. 251; Craig v. Hukill, 37 W. Va. 520, 16 S. E. 363; Negaunee Iron Co. v. Iron Cliffs Co. (Mich.), 96 N. W. 468; Armitage v. Mt. Sterling Oil & Gas Co. (Ky.), 80 S. W. 177; Morris v. Kettle (N. J. Eq.), 34 Atl. 376. See also Hagerty v. White, 69 Wis. 317, 34 N. W. 92; Bucklen v. Hasterlik, 155 Ill. 423, 40 N. E. 561; Mississippi R. Com. v. Gulf & S. I. R. Co., 78 Miss. 750, 29 South. 789; Horsburg v. Baker, 1 Pet. 232; Hodges v. Buell (Mich.), 95 N. W. 1078; Broadnax v. Baker, 94 N. C. 675, 55 Am. Rep. 633. Thus, a court of equity does not lend its aid to divest an estate for a breach of a condition subsequent and thereby enforce a forfeiture. Birmingham v. Lesau, 77 Me. 494, 1 Atl. 51; Donnelly v. Eastes, 94 Wis. 390, 69 N. W. 157; nor will it entertain a complaint for the purpose of inserting a forfeiture clause in an absolute deed; Mills v. Evansville Seminary, 52 Wis. 669, 9 N. W. 925. In McCormick v. Rossi, 70 Cal. 474, 15 Pac. 35, plaintiff sought a decree that defendant had forfeited all rights under a contract for the sale of land by non-payment of the purchase price. It was held that the relief should be denied, for otherwise a forfeiture would be enforced. A similar result was reached in Crane v. Dwyer, 9 Mich. 350, 80 Am. Dec. 87, where the vendor, after default by vendee, sought to enjoin the latter from removing buildings from the premises. But in McClellan v. Coffin, 93 Ind. 456, it is held that equity will interfere to remove a cloud on title, even though the forfeiture of some interest may indirectly result. Equity will not divest a vested estate by enforcing a forfeiture for the breach of a subsequent condition: Craig v. Hukill, 37 W. Va. 520, 16 S. E. 363. See also Pike's Peak Power Co. v. City of Colorado, 105 Fed. 1, 44 C. C. A. 33; Henry v. Mayer (Ariz.), 53 Pac. 590; Morse v. O'Reilly, Fed. Cas. No. 9,858. It has been held that a bill to quiet title cannot be maintained to enforce a condition subsequent contained in a deed. Brown v. Chicago & N. W. R'y Co. (Iowa), 82 N. W. 1003. In Harper v. Tidholm, 155 Ill. 370, 40 N. E. 575, a vendee of land recorded his contract for a deed and then made default. The court held that complainant might maintain a bill to remove the cloud on the title. "In affording this relief, it, of course, became necessary for the court to determine whether the contract was still subsisting or not; and the effect of this decree was to find that it had been terminated, in accordance with its terms, by the acts of the parties themselves, and that it was therefore null and void, and a cloud upon the title." A party cannot come into equity to enforce a forfeiture by injunction: Coe v. Columbus, P. & I. R. Co., 10 Ohio St. 372, 75 Am.

are not real exceptions, since they all depend upon other rules and principles.[1] The reasons of the doctrine are to be found in the universal principle that a court of equity refuses to aid any party who, by the remedy which he seeks to obtain against his adversary, is not himself doing equity, or who does not come before the court "with clean hands,"—the same principle upon which the court acts when it refuses to specifically enforce a contract which is unequal, unjust, or has any inequitable features and incidents.

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[1] Popham v. Bampfield, 1 Vern. 83; Carey v. Bertie, 2 Vern. 339; United States v. McRae, L. R. 4 Eq. 327; Livingston v. Tompkins, 4 Johns. Ch. 415, 431, 8 Am. Dec. 598; Baxter v. Lansing, 7 Paige, 350, 353; Gordon v. Lowell, 21 Me. 251; Smith v. Jewett, 40 N. H. 530, 534; Atlas Bank v. Nahant Bank, 3 Met. 581; Warner v. Bennett, 31 Conn. 461, 468; Oil Creek R. R. v. Atlantic & G. W. R. R., 57 Pa. St. 65; Meig's Appeal, 62 Pa. St. 28, 35, 1 Am. Rep. 372; McKim v. White Hall Co., 2 Md. Ch. 510; White v. Port Huron, etc., R. R., 13 Mich. 356; Michigan Bank v. Hammond, 1 Doug. (Mich.) 527; Lawl v. Hyde, 39 Wis. 353; Eveleth v. Little, 16 Me. 374, 377; Clarke v. Drake, 3 Chand. 253, 259; Fitzhugh v. Maxwell, 34 Mich. 138; Beecher v. Beecher, 43 Conn. 556. In Oil Creek R. R. v. Atlantic, etc., R. R., 57 Pa. St. 65, Mr. Justice Sharswood explained the equitable grounds of this universal doctrine as follows: A lease had been granted containing a condition that the lessee should build a certain railroad within a prescribed time, and the plaintiffs sought to enforce a forfeiture of the lease on account of the defendant's non-performance of this condition. It was, therefore, very plainly a case where the court could not, in accordance with the settled rule, set aside the forfeiture at the suit of the lessee. The court said: "A bill for the specific enforcement of a contract is an appeal to the conscience of the chancellor. He exercises upon the question presented a sound discretion, under all the circumstances of the case, for the most part untrammeled by rule or precedent. If the bargain is a hard or unconscionable one, if the terms are unequal, if the party calling for his aid is seeking an undue advantage, he declines to interfere. Therefore it is that although courts of equity will not, in general, relieve against a forfeiture, unless it be in the case of non-payment of rent, where an exact and just compensation can be made by decreeing to the landlord the arrears of his rent, with interest and costs, yet they never lend their assistance to the enforcement of one, but leave the party to his legal remedies. More especially in this the case where the contract

Dec. 518. Thus, in Worthington v. Moon, 53 N. J. Eq. 46, 30 Atl. 251, the plaintiff sought to enjoin a trespass by defendant, who was removing clay from plaintiff's land. Plaintiff maintained that defendant had forfeited the right to remove the clay already dug by not taking it in time. The court held that it would not enforce the forfeiture by the injunction. In Drake v. Lacoe, 157 Pa. St. 17, 27 Atl. 538, the plaintiff sought a decree of forfeiture for non-payment of royalties. The court held that by long delay in asserting rights the lessor had waived the right to this. In Field v. Ashley, 79 Mich. 231, 44 N. W. 602, a bill was brought for an injunction against a vendee who had not acquired title to prevent a disposition of the property. The court said: "It is established beyond controversy that courts of chancery in this state have jurisdiction in cases of this character. Such bills are analogous to foreclosure bills, and do not seek to enforce a forfeiture.

§ 460. There are, in fact, no exceptions to this doctrine; those which appear to be exceptions are not so in reality.[a] Thus a court of equity may, by its restraining decree or injunction, compel the observance of stipulations in the nature of conditions by which some restraint is imposed upon the use or occupation of land conveyed, such as the provisions in a deed by which the grantee is forbidden to build in a certain manner, or to use the premises for certain purposes, thereby creating a servitude in favor of adjacent land of the grantor. Compelling the performance of such a stipulation, which perhaps may be in the form of a condition, by restraining its violation, is plainly not the enforcement of a forfeiture.[1] Again, a provision in the form of a condition may be specifically enforced as though it was a simple covenant, but without any forfeiture. The agreement is thus treated as though it was not a condition, and its specific performance is in fact the very reverse of a forfeiture.[2]

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has been substantially carried out, but its literal fulfillment has been prevented by uncontrollable circumstances. It is unnecessary to cite authorities in support of these positions. They underlie all the cases which abound upon the subject, and have been canonized in the standard elementary works. They commend themselves to every man's common sense of reason and justice, in view of the special objects which courts of equity have been constituted to effectuate."

[1] Gibert v. Peteler, 38 N. Y. 165, 97 Am. Dec. 785; Trustees, etc. v. Lynch, 70 N. Y. 440, 26 Am. Rep. 615, and cases cited; Lattimer v. Livermore, 72 N. Y. 147; Badger v. Boardman, 16 Gray, 559; Whitney v. Union R'y, 11 Gray, 359, 71 Am. Dec. 715; Linzee v. Mixer, 101 Mass. 512; Dorr v. Harrahan, 101 Mass. 531, 3 Am. Rep. 398.

[2] Livingston v. Sickles, 8 Paige, 398, 7 Hill, 253; Carpenter v. Catlin, 44 Barb. 75; Leach v. Leach, 4 Ind. 628, 58 Am. Dec. 642.

[a] Quoted in Moberly v. City of Trenton (Mo.), 81 S. W. 169. Cited with approval to effect that there are no exceptions to the rule in Craig v. Hukill, 37 W. Va. 520, 16 S. E. 363. In Negaunee Iron Co. v. Iron Cliffs Co. (Mich.), 96 N. W. 468, however, it is held that equity may recognize a forfeiture when it is only an incident of a past transaction.

SECTION II.

CONCERNING ELECTION.

ANALYSIS.

§ 461. Questions stated.
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§ 463. In the Roman law.
§ 464. Foundation, the presumed intention of the donor.
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§ 482. Infancy or coverture of testator.
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§ 506. The remaining questions stated.
§§ 507–510. Who may elect; married women; infants; lunatics.
§§ 511, 512. Rights and privileges of persons bound to elect.
§ 513. Time of election; state statutes.
§§ 514, 515. Mode of election, express or implied; conduct amounting to an election.
§§ 516, 517. Effects of an election.
§§ 518, 519. Equitable jurisdiction in matters of election.

§ 461. Questions Stated.[a]— As I have already said in the preceding chapter, the equitable doctrine of election originates in inconsistent or alternative gifts, with the intention, either expressed or implied, that one shall be the substitute for the other. A court of equity, therefore, acting upon the fundamental principle that he who seeks equity must do equity, as explained in a former section, declares that the donee is not entitled to both benefits, but to the choice of either,— to an election between them.[1] There are two cases, differing in their circumstances, but depending upon this one broad principle, which are to be considered, although the first of them only is usually included under the name "election;" the second will more properly be treated of under the title of satisfaction. 1. The owner of an estate, in an instrument of donation, either will or deed, uses language with reference to the property of another, which, if that property were his own, would amount to an effectual disposition of it to a third person; and by the same instrument gives a portion of his own estate to that same proprietor whose rights of ownership he had thus assumed to transfer. Under these circumstances, an obligation rests upon that proprietor either of relinquishing (at least to the extent of indemnifying those whom he disappoints) the benefit conferred on him by the instrument, if he asserts his own inconsistent proprietary rights; or if he accepts that benefit, of completing the intended disposition, by transferring to the third person that portion of his own property which it purports to effect.[2] There is a particular branch of this case in which the doctrine of election may arise, not because a party has attempted to transfer property *not his own,* but where a testator has attempted to dispose of some of *his own* property by means of a will ineffectual for that purpose.[3] 2. If the person to whom, by an instrument of donation, a benefit is given, possesses at the same time a previous claim against the donor, and an intention appears that he shall not both enjoy the benefit and enforce the claim, the same equitable doctrine requires the donee to *elect* between his original and his substituted rights; the gift being designed as a satisfaction of the claim, he cannot accept the former without renouncing the latter.[4] It is to the first of these two cases that the doctrine of "election," technically so called, applies, which will be examined in the present section.

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[1] See *ante*, § 395; Mr. Swanston's note to Dillon v. Parker, 1 Swanst. 394; Snell's Equity, 178.

(a) This chapter is cited, generally, in Moore v. Baker, 4 Ind. App. 115, 51 Am. St. Rep. 203, 30 N. E. 629.

§ 462. **Rationale of the Doctrine.**— The essential facts presenting an occasion for the doctrine of election are: A gives to B property belonging to C, and by the same instrument gives to C other property belonging to himself. The equitable doctrine upon these facts, briefly, is: C has two alternatives: 1. He may elect to take under the instrument, and to carry out all its provisions; he will then take A's property, which was given to him, and B will take C's property. 2. He may elect against the instrument. In that case he will not wholly forfeit the benefits intended to be conferred upon him; he must surrender only so much of such benefits as may be necessary to compensate B for the disappointment he has suffered by C's election to take against the instrument.[1] [a] The foundation of this doctrine is said by the early cases to be the *intention* of the donor, either expressed in the instrument or implied by its terms; and the court, by requiring an election to be thus made, is said to be carrying into effect this assumed intention.[2] Whether this be the correct explanation of the rule will be considered in subsequent paragraphs. As the doctrine of election is one of the most distinctive and remarkable features of equity jurisprudence, I purpose in my further treatment of it to explain, in the first place, its general meaning, scope, and effect; and in the second place, to describe its particular applications, together with its limitations and exceptions as established by the course of decision.

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[2] Mr. Swanston's note *b* to Dillon v. Parker, 1 Swanst. 394; Snell's Equity, 178.

[3] As where a testator, by the same will, has purported to devise his land to a third person, and has bequeathed personal property to his heir at law, and the will is valid as one of personal estate, but ineffectual as one of real estate.

[4] Snell's Equity, 178.

§ 463. **In the Roman Law.**— The germ of the doctrine of election, as above stated, is confessedly to be found in the Roman law. The substance of a Roman testament consisted in the designation of some person who was thereby constituted the heir or universal successor to the testator, and a time was allowed him in which to decide whether he would accept or reject the inheritance. If he accepted, he not only acquired a title to all the property and assets of the deceased, but he also became subject to all the debts and liabilities of the testator, and substantially to all the legacies and bequests to particular individuals contained in the will. Among the burdens thus assumed by the heir was that of procuring for a legatee or giving to him the value of any particular subject-matter which the testator had bequeathed to him, knowing that it belonged to a third person. If a testator, besides appointing Titius his heir, had said, "I bequeath to Claudius the house of Sempronius, situate at Tusculum," Titius, on accepting the inheritance, was bound either to purchase the house of Sempronius, and convey it to Claudius, or if that was impossible, to pay Claudius the appraised value of the house. This rule, however, only applied where the testator knew that the thing which he bequeathed was the property of another, and not if he *erroneously supposed* that it was *his own.* In that case the legacy would be simply void. This doctrine is stated in the Institutes as follows: "A testator may not only give as a legacy his own property, or that of his heir, but also the property of others. The heir is then obliged either to purchase and deliver it, or if it cannot be bought, to give its value. . . . . But when we say that a testator may give the goods of another as a legacy, we must be understood to mean that this can only be done if the deceased knew that what he bequeathed belonged to another, and not if he were ignorant of it; since, if he had known it, he would not, perhaps, have left such a legacy."[1] In this respect, our equity jurisprudence differs widely from the Roman law, since the equitable doctrine of election applies, whether the donor was or was not aware that he was dealing with property not his own.[a]

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[1] Gretton v. Haward, 1 Swanst. 409, 433, and the note of Mr. Swanston, in which the prior decisions are collected, and rules deduced from them are formulated.

[2] Dillon v. Parker, 1 Swanst. 359, 394, note of Mr. Swanston.

(a) This paragraph of the text is cited in Hattersley v. Bissett, 51 N. J. Eq. 597, 40 Am. St. Rep. 532, 29 Atl. 187.

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[1] Justinian's Institutes, lib. ii., tit. xx., § 4: "Non solum autem testatoris vel heredis res, sed etiam aliena legari potest, ita ut heres cogatur redimere eam et præstare; vel si non potest redimere, æstimationem ejus dare. . . . . Quod autem diximus alienam rem posse legari, ita intelligendum est, si defunctus sciebat alienam rem esse, non et si ignorabat; forsitan enim si scisset alienam, non legasset."

The French code entirely refuses to adopt the doctrine of election, and the bequest or donation of another's property would be void. Code Civil, § 1021: "Lorsque le testateur aura légué la chose d'autrui, le legs sera nul, soit que le testateur ait connu, ou non, qu'elle ne lui appartenait pas."

(a) The text is cited to this effect in Barrier v. Kelly (Miss.), 33 South. 974.

§ 464. **Presumed Intention of the Donor.** [a]— In seeking the origin of the doctrine, and endeavoring to ascertain its true foundation, I will quote by way of illustration one of the earliest cases in which the question distinctly arose:[1] "A was seised of two acres, one in fee, t'other in tail; and having two sons, he, by his will, devises the fee-simple acre to his eldest son, who was issue in tail; and he devised the tail acre to his youngest son, and dy'd; the eldest son entered upon the tail acre; whereupon the youngest son brought his bill in this court against his brother, that he might enjoy the tail acre devised to him, or else have an equivalent out of the fee acre; because his father plainly designed him something. *Lord Chancellor Cowper:* This devise being designed as a provision for the youngest son, the devise of the fee acre to the eldest son must be understood to be with a *tacit* condition that he shall suffer the younger son to enjoy quietly, or else that the younger son shall have an equivalent out of the fee acre, and decreed the same accordingly." The *rationale* of the doctrine, as shown by this and other decisions, plainly appears to be that a court of equity implies a *condition* where none is expressed in the will, and annexes it to the donation. As Lord Chancellor Cowper says: "The devise of the fee acre to the eldest son is understood to be with a tacit condition that he shall suffer the younger son to enjoy quietly." It should be remarked that this gives no real explanation,— adds nothing to the mere statement of the doctrine itself. When we say that equity implies a condition in the instrument annexed to the donation, we are, in fact, only stating the doctrine of election in other words; the very obligation to elect consists in the conditional nature of the devise. Judges have therefore gone a step further back, and have said that the condition is implied, because such result —

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[1] Anonymous, Gilb. Eq. 15.

(a) This paragraph of the text is cited in Hattersley v. Bissett, 51 N. J. Eq. 597, 40 Am. St. Rep. 532, 29 Atl. 187. §§ 464–471 are cited in Drake v. Wild, (Vt.), 39 Atl. 248.

such tacit addition to the instrument — must be regarded as being in accordance with the actual intention of the testator or other donor. This, then, is said to be the foundation of the doctrine,— the actual intention of the donor assumed, from the nature of the gifts, to have existed. A disposition calling for an application of the doctrine of election may be made under two following different states of circumstances: Either the donor may know that the property which he assumes to deal with is not his own, but belongs to another, and notwithstanding such knowledge he may assume to give it away; or he may give it away, not knowing that it belongs to another, but erroneously and in good faith supposing that it is his own. In the first of these two cases, the presumption of an intention on the part of the donor to annex a condition to the gift calling for an election by the beneficiary plainly agrees with the actual fact; at all events, it violates no probabilities. When a testator devises an estate belonging to A to some third person, and at the same time bestows a portion of his own property upon A, he undoubtedly must rely upon the benefits thus conferred upon A as an inducement to a ratification by A of the whole disposition. To give A the property which the testator was able to dispose of, and at the same time to allow him to claim his own estate, which had been devised to the third person, by his own paramount title, would be to frustrate the evident intention of the testator. In the second case, where the testator, or other donor, erroneously supposes that the property which he undertakes to give away is in fact his own, the doctrine of election applies with the same force and to the same extent as in the former.[2] Here it is in the nature of things simply impossible that the donor could actually have had the *intention* which the theory imputes to him, since he really believes himself to have a disposing power of the property, or to be dealing with property which is his own.[b] And yet the earlier decisions, at least, regarded the presumed intention to annex a condition to the gift as the true foundation of the doctrine in this case as much as in the other.[3] The course of reasoning through which the judicial mind passed in reaching these conclusions is very plain, and, as I think, very natural. In an

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[2] See Cooper v. Cooper, L. R. 6 Ch. 15, 16, 20. In the court of first instance, Vice-Chancellor Stuart held there was no case for an election. He said (p. 16, in note): "In order to raise a case for election, there must be an attempted disposition of property over which the testator has no disposing power, and a disposition of property of his own on such a footing as shows *that he considered himself to have power to dispose of the former property.*" The vice-chancellor thus expresses an opinion that the doctrine of election *only applies* in

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the second case mentioned in the text, namely, when the donor had acted under an erroneous supposition. This decision was reversed by the court of appeals. Lord Justice James thus states the doctrine (p. 20): "The vice-chancellor appears to have thought that there was some distinction between an invalid gift of property which the testator believed to be his own and an invalid gift of property which the testator knew not to be his own, but which he believed he had a power of appointment over, which he had not. I am unable to find any authority or any principle on which to rest this distinction. It is in both cases in substance a disposition, or an attempted disposition, by will, of property over which the testator has no disposing power." See Ingram v. Ingram, cited in Kirkham v. Smith, 1 Ves. Sr. 258, 259; Thellusson v. Woodford, 13 Ves. 209, 220; Whistler v. Webster, 2 Ves. 367; Birmingham v. Kirwan, 2 Schoales & L. 444; Grissell v. Swinhoe, L. R. 7 Eq. 291.

[3] The note of Mr. Swanston to the case of Dillon v. Parker, 1 Swanst. 359, 394, 401, has always been considered as an accurate statement of the doctrine and of the reasons upon which it is based. He reaches this conclusion, as applicable under all circumstances: "The foundation of the equitable doctrine is the *intention*, explicit or presumed, of the author of the instrument to which it is applied." The opinion of Lord Alvanley in Whistler v. Webster, 2 Ves. 367, 370, has always been looked upon as a leading one. He says: "The question is very short,— whether the doctrine laid down in Noys v. Mordaunt, 2 Vern. 581, Eq. Cas. Abr. 273, pl. 3, Gilb. Eq. 2, and Streatfield v. Streatfield, Cas. t. Talb. 176, has established this broad principle, viz., that no man shall claim any benefit under a will without conforming, as far as he is able, and giving effect to everything contained in it, whereby any disposition is made showing an intention that such thing shall take place, without reference to the circumstance whether the testator had any knowledge of the extent of his power or not. Nothing can be more dangerous than to speculate upon what he would have done if he had known one thing or another. It is enough for me to say *he had such an intention;* and I will not speculate upon what he would have intended in different cases put."

(b) This paragraph of the text is quoted extensively in Barrier v. Kelly (Miss.), 33 South. 974, a case falling within the second category stated by the author.

early case of the first kind, where a testator had designedly assumed to devise property over which he knew that he had no disposing power, the court saw, and were compelled to see, an actual intention of the testator to annex the tacit condition to his gift, and this intention was made the basis of the doctrine of election as applied under such circumstances. When another case arose of the second kind, where the testator had acted under an erroneous supposition, the court, having concluded that the doctrine of election must also be applied here, naturally, and as a part of their verbal judicial logic, gave to it the same foundation in an assumed intention of the testator, although, under the circumstances, no such intention actually existed or could exist. The doctrine, therefore, although originally springing from an actual intention, and although professing always to be based upon the intention, is really independent of intention; while the language may still be repeated, that the court *presumes* an intention, no evidence would ever be admitted for the purpose of showing its existence or non-existence. In short, the doctrine of election has become a positive rule of the law governing the devolution and transmission of property by instruments of donation, and is invoked wholly irrespective of the intention of the donor, although in the vast majority of cases it undoubtedly does carry into effect the donor's real purpose and design.

§ 465. **True Foundation.**— What, then, is the real foundation? It is possible to answer this question. There is, in my opinion, a true *rationale* which at once relieves the doctrine of election from all the semblance of technicality and untruth attaching to it when it is referred to a presumed intention, which prevents it from being regarded as a stretch of arbitrary power on the part of the court, and which shows it to be in complete harmony with the highest requirements of righteousness, equity, and good faith. I venture the assertion that the only true basis upon which the doctrine can be rested is that maintained in the preceding chapter, namely, the grand principle that he who seeks equity must do equity. This principle has ordinarily been regarded simply as furnishing a guide to the courts in their apportionment of equitable relief among the parties in a great variety of cases; but, as I have shown, it is also the undeniable source of certain distinctively equitable doctrines. There is no doctrine more unmistakably and completely derived from this grand principle than that of election. The whole theory and process of election is a practical application of the maxim, He who seeks equity must do equity. A party asserts his claim to certain property; in order that he may obtain any relief, he must acknowledge and make provision for the equitable rights of other parties derived from the same instrument, and to that end must make his election, so that in either choice those rights shall be preserved. The very election which he is obliged to make consists in the "doing equity" to others which the principle demands. In this principle, He who seeks equity must do equity, is found a sufficient explanation and a solid foundation for the doctrine, which is thus seen to harmonize, in all its phases and applications, with the requirements of justice and good faith.[1] [a]

§ 466. **Meaning, Scope, and Effects — Election in Conformity with the Instrument.**— Having thus ascertained the origin and foundation of the doctrine, I proceed to describe its true meaning, scope, and effect. This discussion will consist mainly in determining with accuracy the nature of the tacit condition imposed by the donor upon the gift which he has made to the beneficiary whose property he also assumed to dispose of to another person. What is this condition? Lord Chancellor Cowper, in the case heretofore quoted, stated it very briefly, that "the eldest son shall suffer the youngest son to enjoy quietly, or else *have an equivalent* out of the fee acre." The tacit condition is thus always double and alternative in its form. Its effect is, that the donee, whose own property has also been given to another person, may elect either to take under and in conformity with the will or other instrument of donation, or else to take against it. If he elects the first alternative, and takes under the will, then the condition simply requires him to carry out all the dispositions of that instrument. In other words, he receives the testator's property directly bestowed upon him as devisee, and at the same time conveys his own estate to the other person designated by the will as the recipient of it. There is no difficulty in this case, no doubt or question concerning this alternative branch of the tacit condition; the will or other instrument of donation is carried into effect in exact conformity with its dispositions.[a]

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[1] Some writers and some judges, in treating "election" as based wholly upon the notion of a presumed *intention*, have described the doctrine, in certain of its applications, as arbitrary and technical, and as an unwarrantable exercise of power by the court of chancery. In abandoning the theory of an "intention" as more formal than real, and in placing election upon a basis of principle, — He who seeks equity must do equity, — I have, I would venture to suggest, relieved it from these criticisms, and have shown that the early chancellors, in its invention and development, acted wisely, and in full accordance with the conceptions of a high morality, upon which the whole system of equity jurisprudence is constructed.

(a) The text is cited in Penn v. Guggenheimer, 76 Va. 839, 846. The author's conclusions are also approved in Barrier v. Kelly (Miss.), 33 South. 974.

§ 467. **Election in Opposition thereto.**—The only difficulty arises when the party upon whom the condition rests elects to take against the will. In such case he retains his own estate, which the will had assumed to bestow upon the other person, but of course cannot claim, to its full extent at least, the testator's property which the will had given to himself. What is, then, the import of the tacit condition? It does not say he must take in conformity to the will, or else forfeit the testator's property given by it to him. If that were the effect of the condition, the forfeited property would either descend to the testator's heir, or be embraced in the residuary clause of the will, and the third person intended by the testator to be benefited would receive nothing. The condition therefore says that he shall confirm the will, or else, out of the testator's property given *to him* by the will,

(a) The text is cited in Penn v. Guggenheimer, 76 Va. 839, 846.

he shall make compensation to the third person, who is disappointed by his choice. The tacit condition imposing the obligation of an election upon one party contrives a means of satisfying the substantial rights of *both* parties, by compelling full equity to be done. This import of the condition imposed upon the donee who is to make the election is well stated in the following conclusions reached by Mr. Swanston, after a review of the authorities, in his well-known note to Gretton v. Haward,[1] viz.:—

1. That in the event of an election to take against the instrument, courts of equity assume jurisdiction to se-

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[1] Gretton v. Haward, 1 Swanst. 409, 433, 441. The doctrine is ably stated in the following opinion of Sir Thomas Plumer, M. R., in this case, which has always been regarded as a leading one (p. 423): "Few cases are to be found on the subject, but it must be acknowledged that the language of the great judges by whom it has been discussed proceeds to the extent of ascribing to the court an equity to lay hold on the estate thus taken from the devisee by the principle of election, and dispose of it in favor of those whom he has disappointed; not merely taking it from one, but, such is the uniform doctrine, bestowing it on the other, — a doctrine not confined to instances in which the heir is put to election, and which may be said to bring him within the operation of the general principle, but prevailing as a universal rule of equity, by which the court interferes to supply the defect arising from the circumstance of a double devise, and the election of the party to renounce the estate effectually devised; and instead of permitting that estate to fall into the channel of descent, or to devolve in any other way, lays hold of it, to use the expression of the authorities, for the purpose of making satisfaction to the disappointed devisee, — a very singular office; for in ordinary cases, where a legatee or devisee is disappointed, the court cannot give relief, but here it interposes to assist the party whose claim is frustrated by election. Such is the language of Lord Chief Justice De Grey, cited with approbation by Lord Loughborough: 'The equity of this court is to sequester the devised estate *quousque* till satisfaction is made to the disappointed devisee.' I conceive it to be the universal doctrine that the court possesses power to sequester the estate till satisfaction has been made, not permitting it to devolve in the customary course. Out of that sequestered estate so much is taken as is requisite to indemnify the disappointed devisee; if insufficient, it is left in his hands. In the case to which I have referred, Lord Loughborough uses the expression that the court 'lays hold of what is devised, and makes compensation out of that to the disappointed party.' . . . It would be too much now to dispute this principle, established more than a century, merely on the ground of difficulty in reducing it to practice, and disposing of the estate taken from the heir at law without any will to guide it; for to this purpose there is no will; the will destined to the devisee, not this estate, but another; he takes by the act of the court (an act truly described as a strong operation); not by descent, not by devise, but by decree, — a creature of equity."

quester the benefits intended for the refractory donee, in order to secure compensation to those whom his election disappoints.

2. That the surplus after compensation does not devolve, as undisposed of, but is restored to the donee, the purpose being satisfied for which alone the court controlled his legal right.

§ 468. **Compensation the Result.**— In this general examination of the doctrine there remains one more question to be considered. In any case for an election, where the party upon whom the necessity devolves elects to take in opposition to the instrument of donation, and therefore retains his own estate which had been bestowed upon the third person, does he thereby lose all claim upon or benefit of the donor's property given to himself? or does he only lose such part of it or so much of its value as may be needed to indemnify the disappointed third person? In adjusting the equities between himself and the third person, must he necessarily surrender to that person the entire gift made to himself? or must he simply make adequate compensation? Few, if any, of the cases have required a decision of this question;[1] and what has been said concerning it has chiefly been by way of argument and of judicial *dictum*. The rule may be regarded, however, as settled by the weight of judicial opinion very strongly in favor of *compensating* the donee who is disappointed by an election against the instrument. If the gift which he takes by way of substitution is not sufficient in value to indemnify him for that which he has lost, he of course retains the whole of it.[2] [b]

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[1] The reason is very plain. A person compelled to elect will generally be influenced, in making the election, solely by his own pecuniary interests. If the property bequeathed to himself by a will is more valuable than his own, he naturally elects to take under the will, and lets his own estate go to the third person. If the property bequeathed to himself be less valuable than his own, he elects to take against the will, and retains his own. It is then of no consequence whether the principle adopted with reference to the bequest made to himself be forfeiture or compensation, since the whole subject-matter is insufficient to indemnify the disappointed legatee. In other words, the third person takes all the bequest in question, and must be satisfied with it, for he has no right to anything more. The question would arise in such a case as the following: A testator bequeaths fifty thousand dollars to A, and devises to B an old family estate of which A is owner in fee, and which is worth only twenty thousand dollars. A, from attachment to the family estate, elects to keep it, and thus to take in opposition to the will. Is B then entitled to the whole fifty thousand dollars? or only to twenty thousand dollars of it, — the value of the estate which he loses by the election, — so that the balance of thirty thousand dollars would still belong to A? The latter alternative is the view taken by the weight of authority.[a]

(a) This note is cited in Barrier v. Kelly (Miss.), 33 South. 974.

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[2] Gretton v. Haward, 1 Swanst. 409, 423, 433, 441. See opinion of Sir T. Plumer, M. R., and note of Mr. Swanston, quoted *ante*, § 467; Rogers v. Jones, 3 Ch. Div. 688; Pickersgill v. Rodger, 5 Ch. Div. 163, 173. In Rogers v. Jones, 3 Ch. Div. 688, under the peculiar circumstances of the case, the question was actually decided, and the opinion was not a *dictum*. Jessel, M. R., said (p. 689): "The doctrine of election is this: that if a person whose property a testator affects to give away takes other benefits under the same will, and at the same time elects to keep his own property, *he must make compensation* to the person affected by his election to an extent not exceeding the benefits he receives." In Pickersgill v. Rodger, 5 Ch. Div. 163, 173, Jessel, M. R., speaking of a son of a testatrix to whom she had devised property, says (p. 173): "Consequently, as between his (the son's) estate and her disappointed legatees, her disappointed legatees are entitled to put his estate to an election; that is, any disappointed legatee is entitled to say, 'You shall not have the benefit given to your estate by the will, unless I have made up to me an equivalent benefit to that which the testatrix intended me to take.' Sometimes this is called the doctrine of compensation, *which is the meaning of the doctrine of election* as it now stands. The disappointed legatee may say to the devisee, 'You are not allowed by a court of equity to take away out of the testatrix's estate that which you would otherwise be entitled to, until you have made good to me the benefit she intended for me.' That means that no one can take the property which is claimed under the will without making good the amount; or in other words, as between the devisees and legatees claiming under the will, the disappointed legatees are entitled to sequester or to keep back from the other devisees or legatees the property so devised and bequeathed, until compensation is made. Thence arises the doctrine of an equitable charge or right to realize out of that property the sum required to make the compensation. If you follow out that doctrine, you will see that the person taking the property so devised or bequeathed takes it subject to an obligation to make good to the disappointed legatee the sum he is disappointed of. The very instrument which gives him the benefit gives him the benefit burdened with the obligation, and the old maxim, *Qui sentit commodum sentire debet et onus*, applies with the greatest force to such a case as this." The doctrine is here explained by the able master of rolls with his usual clearness and precision. The concluding sentences of the passage fully sustain the view maintained by me, that the whole doctrine is derived from the principle, He

(b) This paragraph of the text is cited and followed in Brown v. Brown, 42 Minn. 270, 44 N. W. 250; Hattersley v. Bissett, 51 N. J. Eq. 597, 40 Am. St. Rep. 532, 29 Atl. 187; Barrier v. Kelly (Miss.), 33 South. 974. See also Hamilton v. Hamilton [1892], 1 Ch. 306.

§ 469. **A Fund from Which Compensation can be Made, Essential.**—As the doctrine of election thus depends upon the principle of compensation, if follows as a necessary consequence that it will not be applicable in any case unless there is a fund given to the donee who is compelled to elect, from which a compensation can be made to the disappointed parties, or which perhaps can be transferred as a whole to such parties. Thus in a case where, under a power to appoint to children, the father made an appointment improperly, it was held by Lord Loughborough that any child, entitled in default of an appointment, might set it aside, although a specific share had been appointed to him; in other words, that no election was necessary. The lord

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who seeks equity must do equity. In Howells v. Jenkins, 1 De Gex, J. & S. 617, 619, Turner, L. J., stated this doctrine: "The true principle appears to me to be, that where a person elects to take against a will, the persons who are disappointed by that election are entitled to compensation, out of the benefits given to him by the will, in proportion to the value of the interests of which they are disappointed." See also the following cases, which, either by judicial *dicta* or by decision, sustain the rule as to compensation: Streatfield v. Streatfield, Cas. t. Talb. 176; Webster v. Metford, 2 Eq. Cas. Abr. 363; Bor v. Bor, 3 Brown Parl. C., Tomlins's ed.. 167; Ardesoife v. Bennett, 1 Dick. 463; Lewis v. King, 2 Brown Ch. 600; Freke v. Barrington, 3 Brown Ch. 274, 284; Whistler v. Webster, 2 Ves. 367; Ward v. Baugh, 4 Ves. 623; Lady Caven v. Pulteney, 2 Ves. 544, 560; Blake v. Bunbury, 1 Ves. 514, 523; Welby v. Welby, 2 Ves. & B. 190, 191; Dashwood v. Peyton, 18 Ves. 27, 49; Tibbits v. Tibbits, Jacob, 317; Lord Rancliffe v. Parkyns, 6 Dow. 149, 179; Ker v. Wauchope, 1 Bligh, 1, 25; Padbury v. Clark, 2 Macn. & G. 298; Greenwood v. Penny, 12 Beav. 403; Grissell v. Swinhoe, L. R. 7 Eq. 291; Spread v. Morgan, 11 H. L. Cas. 588; Cauffman v. Cauffman, 17 Serg. & R. 16, 24, 25; Philadelphia v. Davis, 1 Whart. 490, 502; Stump v. Findlay, 2 Rawle, 168, 174, 19 Am. Dec. 632; Lewis v. Lewis, 13 Pa. St. 79, 82, 53 Am. Dec. 443; Van Dyke's Appeal, 60 Pa. St. 481, 490; Sandoe's Appeal, 65 Pa. St. 314; Key v. Griffin, 1 Rich. Eq. 67; Marriott v. Sam Badger, 5 Md. 306; Maskell v. Goodall, 2 Disn. 282; Roe v. Roe, 21 N. J. Eq. 253; Estate of Delaney, 49 Cal. 77; Tiernan v. Roland, 15 Pa. St. 430, 451; Wilbanks v. Wilbanks, 18 Ill. 17.[c] Lapse of time,

(c) See also Estate of Vance, 141 Pa. St. 201, 12 L. R. A. 227, 33 Am. St. Rep. 267, 21 Atl. 643. The doctrine of compensation does not apply to the case of a person electing to take *under* the will; thus, where the person so electing cannot assign his interest, for the purpose of confirming the will, either because such interest is not assignable or because the assignment of it would involve a breach of trust, the court will not award compensation to the disappointed legatee: In re Lord Chesham, L. R. 31 Ch. Div. 466.

chancellor said: "The doctrine of election never can be applied but where, if an election is made contrary to the will, the interest that would pass by the will can be laid hold of to compensate for what is taken away; therefore, in all cases there must be some free, disposable property given to the person, which can be made a compensation for what the testator takes away."[1] This is not, however, any new and additional requisite; it is merely a statement, in a somewhat different form, of the fundamental doctrine, that, in order to create the necessity for an election, the donor must give to B some property which actually belongs to A, and must at the same time give to A some property of his own.[a]

§ 470. **Doctrine Applies Both to Wills and Deeds.**— It may be added that the doctrine of election, as generally described in the foregoing paragraphs, applies to all instruments of donation,— to deeds, settlements, and the like, as well as to wills,— although the cases involving it have most frequently arisen under wills.[1] [a] It is also applicable to

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and the interests of third persons who have purchased, may render an election absolute, and prevent a payment of compensation, instead of the property itself. See Fulton v. Moore, 25 Pa. St. 468, 476.

The following are the most important cases and text-writers containing *dicta* in favor of the rule that, by an election against a will, the donee loses or forfeits his right to all the property of the testator given to him: Cowper v. Scott, 3 P. Wms. 124; Cookes v. Hellier, 1 Ves. 235; Morris v. Burroughs, 1 Atk. 404; Pugh v. Smith, 2 Atk. 43; Wilson v. Mount, 3 Ves. 194; Wilson v. Townsend, 2 Ves. 697; Broome v. Monck, 10 Ves. 609; Thellusson v. Woodford, 13 Ves. 220; Villareal v. Lord Galway, 1 Brown Ch. 292, note; Green v. Green, 2 Mer. 86; also note by Mr. Jacob, in his edition of Roper on Husband and Wife, vol. 1; and Lord St. Leonards, in 2 Sugden on Powers, 7th ed., 145. Many of these cases are no doubt to be explained by the fact that ordinarily when a donee elects to take against the will, and thus to retain his own property, the gift to himself made by the testator is not of sufficient value to indemnify the disappointed parties, and of course they then take it all, and there is no possible room for any compensation.

§ 469, [1] Bristow v. Warde, 2 Ves. 336. See also In re Fowler's Trusts, 27 Beav. 362; Box v. Barrett, L. R. 3 Eq. 244; Banks v. Banks, 17 Beav. 352; Blacket v. Lamb, 14 Beav. 482; Langslow v. Langslow, 21 Beav. 552.

§ 470, [1] Llewellyn v. Mackworth, Barn. Ch. 445; Bigland v. Huddleston, 3 Brown Ch. 286, note; Moore v. Butler, 2 Schoales & L. 266; Birmingham v. Kir-

§ 469, (a) The text is quoted and illustrated in Hunter v. Mills, 29 S. C. 72, 6 S. E. 907.

§ 470, (a) See also Barrier v. Kelly (Miss.), 33 South. 974.

interests which are remote, contingent, partial, or of small value, as well as to those which are immediate, certain, complete, and of great value.[2]

§ 471. **Applications — Cases for an Election Classified.**— Having thus, according to the arrangement announced in a former paragraph, explained the origin, general scope, meaning, and effect of the doctrine, I shall now proceed to consider it with respect to its practical applications, its limitations, and exceptions. In other words, I shall describe the particular cases in which the necessity for an election does or does not arise, and the rules which determine and regulate them. In pursuing this branch of the subject, I shall state first in order those rules which are universal in their application, and in determining the necessity for an election or not in all instances, and shall then enumerate and classify the cases which have been settled by the courts in pursuance of these rules.

§ 472. **Fundamental Rule.**— The first and fundamental rule, of which all the others are little more than corollaries, is: In order to create the necessity for an election, there must appear upon the face of the will itself, or of the other instrument of donation, a clear, unmistakable intention, on the part of the testator or other donor, to dispose of property which is in fact not his own. This intention to dispose of property which in fact belongs to another, and is not within the donor's power of disposition, must appear from language of the instrument which is unequivocal, which leaves no doubt as to the donor's design; the necessity of an election can never exist from an uncertain or dubious

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wan, 2 Schoales & L. 450; Green v. Green, 2 Mer. 86; Bacon v. Cosby, 4 De Gex & S. 261; Cumming v. Forrester, 2 Jacob & W. 345; Anderson v. Abbott, 23 Beav. 457; Mosley v. Ward, 29 Beav. 407. The cases of election so frequently arise from wills that the general rules concerning it have sometimes been laid down, especially by American courts, in language which appears to confine it to those instruments.

[2] Webb v. Earl of Shaftsbury, 7 Ves. 480; Greaves v. Forman, cited 3 Ves. 67; Highway v. Banner, 1 Brown Ch. 584; Wilson v. Townshend, 2 Ves. 697; but see Bor v. Bor, 3 Brown Parl. C., Tomlins's ed., 178, note, per Lord Hardwicke.

interpretation of the clause of donation.[a] It is the settled rule that no case for an election arises unless the gift to one beneficiary is irreconcilable with an estate, interest, or right which another donee is called upon to relinquish; if both gifts can, upon any interpretation of which the language is reasonably susceptible, stand together, then an election is unnecessary. The instrument may declare in express terms that the gift to A must be accepted by him in lieu of his own interest, which is thereby transferred to B, and then no possible doubt could exist. But this direct mode of exhibiting the donor's purpose is not indispensable. It is sufficient if the dispositions of the instrument, fairly and reasonably interpreted, exhibit a clear intention of the donor to bestow upon B some estate, interest, or right of property, which is not the donor's, but which belongs to A, and at the same time to give to A some benefits derived from the donor's own property.[1] [b] It is immaterial, however, whether the donor knew the property not to be his own, or erroneously conceived it to be his own; for in either case, if the

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[1] Forrester v. Cotton, 1 Eden, 531; Judd v. Pratt, 13 Ves. 168, 15 Ves. 390; Dashwood v. Peyton, 18 Ves. 27; Blake v. Bunbury, 1 Ves. 514, 4 Brown Ch. 21; Rancliffe v. Lady Parkyns, 6 Dow, 149, 179; Dillon v. Parker, 1 Swanst. 359, Jacob, 505, 7 Bligh, N. S., 325, 1 Clark & F. 303; Jervoise v. Jervoise, 17 Beav. 566; Padbury v. Clark, 2 Macn. & G. 298; Lee v. Egremont, 5 De Gex & S. 348; Wintour v. Clifton, 21 Beav. 447, 8 De Gex, M. & G. 641; Stephens v. Stephens, 3 Drew. 697, 1 De Gex & J. 62; Box v. Barrett, L. R. 3 Eq. 244; Dummer v. Pitcher, 2 Mylne & K. 262; Shuttleworth v. Greaves, 4 Mylne & C. 35; Maxwell v. Maxwell, 2 De Gex, M. & G. 705, 16 Beav. 106; Pickersgill v. Rodger, 5 Ch. Div. 163, 170; Orrell v. Orrell, L. R. 6 Ch. 302, 304; Wilkinson v. Dent, L. R. 6 Ch. 339, 340; Thompson v. Burra, L. R. 16 Eq. 592, 601; Wollaston v. King, L. R. 8 Eq. 165; Maxwell v. Hyslop, L. R. 4 Eq. 407; Codrington v. Lindsay, L. R. 8 Ch. 578; McElfresh v. Schley, 2 Gill, 182, 201; Jones v. Jones, 8 Gill, 197; Waters v. Howard, 1 Md. Ch. 112; Hall v. Hall, 1 Bland, 130, 135; Wilson v. Arny, 1 Dev. & B. Eq. 376, 377; Pennsylvania Life Ins. Co. v. Stokes, 61 Pa. St. 136, 2 Brewst. 590; Weeks v. Weeks, 77 N. C. 421; Havens v. Sackett, 15 N. Y. 365; Thompson v. Thompson, 2 Strob. Eq. 48;

(a) The text is quoted in Penn v. Guggenheimer, 76 Va. 839, 846.

(b) The text is cited in Bible v. Marshall, 103 Tenn. 324, 52 S. W. 1077; and Fifield v. Van Wyck, 94 Va. 557, 562, 64 Am. St. Rep. 745, 27 S. E. 446; both to the effect that no case is presented for an election where the donor does not attempt to dispose of property not his own. See also, in general. Wooley v. Schrader, 116 Ill. 29, 4 N. E. 658; Hattersley v. Bissett, 51 N. J. Eq. 597, 40 Am. St. Rep. 532, 29 Atl. 187; Matter of Zahrt, 94 N. Y. 605; Asche v. Asche, 113 N. Y. 232, 21 N. E. 70.

O'Reilly v. Nicholson, 45 Mo. 160. The ground upon which the doctrine of election rests, and the condition of facts necessary to raise an election, were carefully considered in the recent case of Codrington v. Lindsay, L. R. 8 Ch. 578, 587, by Lord Selborne. He seems to reach the conclusion that there are two grounds, and two conditions of fact quite distinct from each other, which may create the necessity for an election. It was held that a married woman was bound to elect between certain benefits given to her by a marriage settlement and certain property of her own to which she was entitled independently of the settlement, but which had been embraced within its terms. Lord Chancellor Selborne thus laid down the general doctrine (pp. 586–588): "I lay aside, as not directly relevant to the present question, the whole of that large class of cases of election upon wills, as to which Lord Eldon, in Dashwood v. Peyton, 18 Ves. 41, and other authorities, have said that 'a clear intention on the part of the testator to give that which is not his property is always required.' . . . I conceive the true rule for the decision of this case to be that which is so well stated by Lord Redesdale in Birmingham v. Kirwan, 2 Schoales & L. 444, 449, viz.: 'The general rule is, that a person cannot accept and reject the same instrument; and this is the foundation of the law of election, on which courts of equity particularly have grounded a variety of decisions in cases both of deeds and wills, though principally in cases of wills, because deeds being generally matter of contract, the contract is not to be interpreted otherwise than as the consideration which is expressed requires.' The application of this rule is illustrated as to cases of voluntary deeds by Llewellyn v. Mackworth, Barn. Ch. 445, and Anderson v. Abbott, 23 Beav. 457; as to cases of contract for a valuable consideration resting in articles, by Savill v. Savill, 2 Coll. C. C. 721, and Brown v. Brown, L. R. 2 Eq. 481; and as to contracts for value completely executed by conveyance and assignment, by Bigland v. Huddleston, 3 Brown Ch. 285, note; Chetwynd v. Fleetwood, 4 Brown Parl. C., ed. of 1784, 435; Green v. Green, 2 Mer. 86; Bacon v. Cosby, 4 De Gex & S. 261; Mosby v. Ward, 29 Beav. 407; and Willoughby v. Middleton, 2 Johns. & H. 344. In two of these cases (Green v. Green, 2 Mer. 86, and Willoughby v. Middleton, 2 Johns. & H. 344), the husband's father was a party to an antenuptial settlement, and part of the consideration proceeded from him. Another (Chetwynd v. Fleetwood, 4 Brown Parl. C. 435), was a case of settlement for value, not between husband and wife at all, nor in consideration of marriage. In all of them the party who, claiming by a title not bound by the deeds, thereby withdrew part of the consideration for which the deeds were intended to be made was held obliged to give up, by way of compensation, what he or she was entitled to under the deeds, or *ex converso* (as in Chetwynd v. Fleetwood, 4 Brown Parl. C. 435), was held bound, if taking the benefit of the deeds, to adopt and make good the contract forming the consideration for those benefits, as to matters by which, without such election, he would not have been bound." To the same effect, in Hyde v. Baldwin, 17 Pick. 303, 308, Shaw, C. J., said that it was a well-settled rule in equity that "a man shall not take any beneficial interest under a will, and at the same time set up any right or claim of his own, even if otherwise legal and well founded, which shall defeat, or in any way prevent, the full effect and operaintention to dispose of it clearly appears, the necessity for an election exists.[2] [c]

§ 473. **Rule of Interpretation; Donor has a Partial Interest; Strong Leaning against Election; Extrinsic Evidence of Intention.**— The preceding rule is fundamental and universal. In its application the courts have settled two or three important rules of interpretation, which aid them in arriving at the donor's intent in such instruments. Where the interest of the supposed donee, A, with which the donor assumes to deal, is a separate, distinct, certain estate, property, or right belonging to A individually and solely, and the language of donation identifies such estate, property, or right, and in terms of specific description bestows it upon another beneficiary, no doubt as to the donor's intention can exist; there is no room for interpretation; a case of election is necessarily presented. Where, however, the subject-matter upon which the instrument operates is something in which the donor himself has a partial interest, and the donee has also a partial interest in it, or the residue of the property in it, and the language of donation is susceptible of a construction which would confine it to this partial interest of the donor, it is plain that a judicial interpretation is needed to ascertain the real intent. Under these circumstances, whenever the testator or other donor has a partial interest in the property dealt with, it is well settled that the courts will lean most strongly — as far as possible, it has been said — in favor of an interpretation

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tion of every part of the will." See also Smith v. Guild, 34 Me. 443, 447; Weeks v. Patten, 18 Me. 42, 36 Am. Dec. 696; Hamblett v. Hamblett, 6 N. H. 333; Glen v. Fisher, 6 Johns. Ch. 33, 10 Am. Dec. 310; Fulton v. Moore, 25 Pa. St. 468; Cauffman v. Cauffman, 17 Serg. & R. 16; Preston v. Jones, 9 Pa. St. 456; George v. Bussing, 15 B. Mon. 558; Buist v. Dawes, 3 Rich. Eq. 281.

[2] Cooper v. Cooper, L. R. 6 Ch. 15, 16, 20; Grissell v. Swinhoe, L. R. 7 Eq. 291; Whistler v. Webster, 2 Ves. 370; Thellusson v. Woodford, 13 Ves. 221; Welby v. Welby, 2 Ves. & B. 199; Whitley v. Whitley, 31 Beav. 173; Coutts v. Ackworth, L. R. 9 Eq. 519; Stump v. Findlay, 2 Rawle, 168, 174, 19 Am. Dec. 632; McGinnis v. McGinnis, 1 Ga. 496, 503.

(c) See also to the same effect Moore v. Harper, 27 W. Va. 362; Barrier v. Kelly (Miss.), 33 South. 974.

which will confine his disposition to this his own interest,—an interpretation which will show an intention on his part to deal only by way of gift with this partial interest which he holds. In other words, the difficulty of establishing a case for an election, from the terms of a donation, is much greater where the donor has a partial interest in the property bestowed, than where he assumes to give an estate in which, as a matter of fact, he has no interest.[1] [a] If the language of the donation is ambiguous, so that its correct interpretation is at all doubtful, it is now a firmly established rule that parol evidence of matters outside the instrument cannot be admitted for the purpose of showing an intent of the donor to dispose of property which he knew did not belong to him, and thus to create the necessity for an election. The intent of the donor to dispose of that which is not his ought to appear upon the instrument. There were early decisions which acted upon another view, and received such evidence as controlling, but they have been completely overruled by subsequent authorities. Of course, extrinsic evidence is always admissible in such cases, as well as in all others arising upon wills and deeds, in order to show the surrounding circumstances, the nature and situation of the property, the relations of the donor to the beneficiaries, and the like facts, which place the court in the shoes of the donor; but such evidence can go no further.[2] [b]

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[1] Lord Rancliffe v. Lady Parkyns, 6 Dow, 185; Maddison v. Chapman, 1 Johns. & H. 470; Wintour v. Clifton, 8 De Gex, M. & G. 641, 650, per Turner, L. J.; Havens v. Sackett, 15 N. Y. 365. In Wintour v. Clifton, 8 De Gex, M. & G. 641, 650, Turner, L. J., said: "The authorities, as I understand it, mean no more than to point out forcibly the difficulty there is in raising a case of election where the testator has a limited interest in the property as to which the election is to be raised; and no doubt there is more difficulty in such cases than in the ordinary case of the disposition of an estate belonging to another person, and in which the testator had no interest, inasmuch as every testator must *prima facie* be taken to have intended to dispose only of what he had power to dispose of; and, as in order to raise a case of election, it must be clear that there was an intention on the part of the testator to dispose of what he had not the right or power to dispose of." See also cases in preceding note, and those cited subsequently, under the head of election, in case of dower and other partial interests.

(a) The text is quoted in Toney v. Spragins, 80 Ala. 541. See, also, Sherman v. Lewis, 44 Minn. 107, 46 N. W. 318.

§ 474. Rule of Interpretation: Donor has a Partial Interest, and Makes a General Gift.— A second important rule of interpretation is, that where a testator has a partial interest in the subject-matter dealt with, a general devise of the property, or gift of the property described only in general terms or in a general manner, will ordinarily be construed as including and operating upon the partial interest alone or partial property held by the donor, and not as extending to and disposing of the residuum of interest belonging to the donee. But it should also be observed that even where the language of the gift is thus general, the donor may otherwise show an intention by means of it to bestow the property or interest not absolutely his own.[1] [a]

[2] Clementson v. Gandy, 1 Keen, 309; Smith v. Lyne, 2 Younge & C. Ch. 345; Honeywood v. Forster, 30 Beav. 14; Seaman v. Woods, 24 Beav. 372; Allen v. Anderson, 5 Hare, 163; Blake v. Bunbury, 1 Ves. 523; Stratton v. Best, 1 Ves. 285; Druce v. Denison, 6 Ves. 385; Dummer v. Pitcher, 2 Mylne & K. 262; Crabb v. Crabb, 1 Mylne & K. 511, 5 Sim. 25; Philadelphia v. Davis, 1 Whart. 490; Timberlake v. Parish, 5 Dana, 345; Waters v. Howard, 1 Md. Ch. 112; McElfresh v. Schley, 2 Gill, 182; Jones v. Jones, 8 Gill, 197. Notwithstanding this array of unanimous authorities, in the very recent case of Pickersgill v. Rodger, 5 Ch. Div. 163, 170, where the only question for decision was whether a testatrix had created the necessity for an election, the very able and learned master of rolls, Jessel, used the following language: "The law upon this point I take to be well settled, and it is this: that before you attribute an intention to a testator or testatrix to dispose of that which does not belong to him or her, you must be satisfied from the form of the instrument that it *does* dispose of the property which does not belong to him or her; and that is all. The presumption, in the absence of evidence to the contrary, is, that the testator, by his will, intends merely to devise or bequeath that which belongs to him. On the other hand, *it is only a presumption, which may be rebutted even by parol evidence;* and it may be rebutted by evidence showing that, under a misapprehension of law, the testator believed that the property which did not belong to him did really belong to him." It is certainly difficult to reconcile this passage with the decisions cited above in this note.

[1] Wintour v. Clifton, 8 De Gex, M. & G. 641, 650; Shuttleworth v. Greaves, 4 Mylne & C. 35; Dummer v. Pitcher, 2 Mylne & K. 262; Usticke v. Peters, 4

(b) Sherman v. Lewis, 44 Minn. 107, 46 N. W. 318; Tracey v. Shumate, 22 W. Va. 474, 499; Atkinson v. Sutton, 23 W. Va. 197.

(a) In re Gilmore, 81 Cal. 240, 22 Pac. 655.

§ 475. **Other Particular Rules of Interpretation.**— In addition to these somewhat general rules of interpretation, there are one or two particular rules which belong to this branch of the subject. No case for an election is presented if the language of donation shows that the donor is doubt-

Kay & J. 437; Honeywood v. Forster, 30 Beav. 14; Johnson v. Telford, 1 Russ. & M. 244; Brodie v. Barry, 2 Ves. & B. 127; Maxwell v. Maxwell, 2 De Gex, M. & G. 705, 713; 16 Beav. 106; Orrell v. Orrell, L. R. 6 Ch. 302; Havens v. Sackett, 15 N. Y. 365; Hall v. Hall, 1 Bland, 130, 135; Gable v. Daub, 40 Pa. St. 217. And see cases cited subsequently, under the head of election in case of dower.[b] Although the rule as stated in the text is supported by an overwhelming weight of authority, it is sometimes very difficult of application. I shall therefore refer to a few cases by way of illustration. The language of Turner, L. J., in Wintour v. Clifton, 8 De Gex, M. & G. 641, 650, gives the rule of the text in both of its branches: "I think that if the words of a will be such as to embrace different subjects, the context of the will may be resorted to for the purpose of ascertaining to which of these subjects the words were intended to apply; and I think that the question in every case upon the construction of a will must be, What was the intention of the testator? and that if the intention can be collected from the context, it is the duty of the court to give effect to it, as much as if it was in terms expressed, and no less so in cases of election than in other cases. The authorities on this point mean no more than to point out forcibly the difficulty there is in raising a case of election where the testator has a limited interest in the property as to which the election is to be raised; and no doubt there is more difficulty in such cases than in the ordinary case of the disposition of an estate belonging to another person, and in which the testator had no interest, inasmuch as every testator must *prima facie* be taken to have intended to dispose only of what he had the power to dispose of; and, as in order to raise a case of election, it must be clear that there was an intention on the part of the testator to dispose of what he had not the right or power to dispose of." In Maxwell v. Maxwell, 2 De Gex, M. & G. 705, 713, a testator by an English will in terms gave "all his real and personal estate whatsoever and wheresoever," etc. This language was not sufficient by the Scotch law to embrace lands owned by the testator in Scotland, which therefore descended to his heir at law; and the only question was, whether by this general gift the testator *intended* to embrace the Scotch lands, or to dispose of the English property alone. Knight Bruce, L. J., said (p. 713): "According to the principles or rules of construction which the English law applies, if not to all instruments, at least to testamentary instruments liable to interpretation, the generality, the mere universality, of a gift of property is not sufficient to demonstrate or create a ground of inference that the giver meant it to extend to property incapable of being given by the particular act. If he had specifically mentioned property not capable of being so given, the case is not the same." Cranworth, L. J., said (p. 715): "I take the general rule to be that which was referred to by Sir John Leach, in Wentworth v. Cox, 6 Madd. 363, that a designation of the subject intended to be affected by an instrument in general words imports

(b) See *post*, §§ 492–502.

ful whether the property belongs to himself or not, and that he only intends to bestow it if it is his own; for example, where he directs a different disposition, in case it turns out that he has no power to make the gift, or where he, in terms, makes the disposition, if he has the power to do so, or so far

prima facie that property only upon which the instrument is capable of operating." In Orrell v. Orrell, L. R. 6 Ch. 302, 305, which was a similar case, the testator gave "all the rest and residue of my real estate situate *in any part of* the United Kingdom or elsewhere." The court, while quoting and adopting the rule as laid down in Maxwell v. Maxwell, 2 De Gex, M. & G. 705, 713, held that the peculiar language of the testator, "in any part of," showed his intention to dispose of his Scotch lands as well as those in England, and therefore the rule did not apply. In Johnson v. Telford, 1 Russ. & M. 248, which resembled the two preceding cases, Sir John Leach thus stated the rule: "In the case of Brodie v. Barry, 2 Ves. & B. 127, the Scotch estate was mentioned in the will, and especially intended by the testator to pass thereby. In *this will* no notice whatever is taken of the Scotch estate, and the question is, whether it is clearly to be collected from the general words used that the testator meant to pass his Scotch estate. *Where a testator uses only general words, it is to be intended he means those general words to be applied to such property as will in its nature pass by the will.*" In Honeywood v. Forster, 30 Beav. 14, a testator owned freeholds in fee, and was tenant in tail of the copyholds. They were intermixed; part of the copyholds were in his own occupation, and part, with parts of the freeholds, in the occupation of tenants upon leases at one rent. By his will he devised "all his real estates" to the defendants, and gave all the lands occupied by him to his wife for life, and confirmed the tenants in their occupations for twenty-one years, and also gave benefits to the heir in tail of the copyholds. The question for decision was, whether this heir in tail was put to an election between the copyholds descending to him as heir in tail and the benefits given by the will. Sir John Romilly, M. R., said: "If a testator says, 'I give all the property I have in the world to A B,' and he leaves a large legacy to his heir in tail, that will not raise a case of election against such heir, because the testator only gives what he has. It occurred to me at first that such was the character of the present will; but on the facts of the case being brought to my attention, it became plain that such was not the case. . . . [After recapitulating the provisions of the will and the situation of the property.] I think that in this state of circumstances, coupled with the fact of the nature and holding of the property, there is *an intention shown on the face of the will* to dispose of these copyholds away from the heir in tail." The heir was therefore held bound to elect. The cases of Dummer v. Pitcher, 2 Mylne & K. 262, and Shuttleworth v. Greaves, 4 Mylne & C. 35, well illustrate the rule of the text in both of its branches. In Dummer v. Pitcher, 2 Mylne & K. 262, the testator's will said: "I bequeath the rents of my leasehold houses and the interest of all my funded property or estate." The testator had in fact no funded property at the date of his will, but there was funded property originally belonging to his wife, and standing in the joint names of her and himself. After his death, the wife claimed this funded property by right of survivorship, and as she took benefits under the will, it was con-as he lawfully can, and the like.[1] Since the necessity of an election is only created by something in the nature of a gift or disposition of property, it follows that an erroneous recital in a will, and misconception of the testator as to the effect of the rights of others, will not raise a case of election, though the testator, in consequence of his mistake as to those rights, gives more to one person than to another; the former is not bound to compensate the latter.[2] The doctrine of election is not applicable to cases where the testator, erroneously thinking certain property is his own, gives it to a donee to whom in fact it belongs, and also gives him other property which is really the testator's own; for in such cases the testator intends that the devisee shall have *both*, though he is mistaken as to his own title to one.[3] Nor does

tended that she must elect between these benefits and her own funded property, which, it was claimed, the will had given away. Lord Chancellor Brougham held, affirming the decision of the vice-chancellor, that, although the testator had no funded property of his own at the date of his will, his words might well be construed as intended to apply to any funded property which he might have at his death, and that therefore he was not to be regarded as intending to dispose of the funded property standing in the joint names of himself and his wife, and belonging to her, and consequently that no case for an election arose. In Shuttleworth v. Greaves, 4 Mylne & C. 35, the will said: "I bequeath all my shares in the Nottingham Canal Navigation." At the time and down to his death he had no such shares of his own, but had certain shares of that same canal company standing in the joint names of himself and his wife, and really belonging to her. Under the like circumstances and contention as in the last case, it was held that the words of bequest showed an intention to give away these very shares belonging to his wife, and therefore she was bound to elect. By comparing these two cases, the dividing line, though narrow, is seen to be really substantial. In the first, the words of gift were most general, not referring to or describing any *specific* property. In the second, the same words, although general with respect to amount, do apply to and describe certain *specific* property, and so clearly identify it that there could be no doubt of the testator's intention to bequeath it,—"all *my* shares," etc. See also Havens v. Sackett, 15 N. Y. 365. The American cases involving and illustrating this rule have generally been those where a testator has, in general terms, given land in which his wife held a dower right. Many of them will be found cited under subsequent paragraphs.

[1] Bor v. Bor, 3 Brown Parl. C., Tomlins's ed., 167; Church v. Kemble, 5 Sim. 525.

[2] Box v. Barrett, L. R. 3 Eq. 244; Dashwood v. Peyton, 18 Ves. 41; Blake v. Bunbury, 1 Ves. 515, 523; Forrester v. Cotton, Amb. 388, 1 Eden, 532, 535; and see Langslow v. Langslow, 21 Beav. 552; Clarke v. Guise, 2 Ves. 617, 618.

[3] Cull v. Showell, Amb. 727.

the doctrine apply unless the donee, who, it is claimed, ought to elect, is entitled *in his own right* to the property given to another, and not in his representative capacity; although, in effect, he may be beneficially interested; as, for example, where he takes as his wife's administrator.[4]

§ 476. **First Class of Cases.**— I shall now describe and discuss the most important of the cases which have arisen, and in respect of which it has been settled that the necessity for an election does or does not exist. By a line of separation which the foregoing paragraphs show not to be merely arbitrary, I shall arrange these cases in two main divisions, namely: 1. Those where the donor assumes to give property belonging entirely to another, and in which he himself has no interest; 2. Those where the donor gives property in which he himself has a partial interest, while a partial interest therein is also held by another.

First Class.— Cases in which the donor assumes to give specific property belonging entirely to another, where he himself has no interest in it, and no power of disposition over it.

§ 477. **Ordinary Case: Gift of Specific Property.**— The simplest case is that in which the donor, by language of description sufficient to designate the subject-matter, and by terms of donation sufficient to effect a transfer if they operated upon property of his own, bestows upon B some specific estate, interest, or fund, which in fact belongs entirely to A, and by the same instrument confers upon A some benefit out of the donor's own property. Under these circumstances a case for an election always arises. The whole effect depends upon the question whether there is such a gift; and if so, there is really no room for interpretation or construction. No discussion of this case is needed.[1]

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[4] Grissell v. Swinhoe, L. R. 7 Eq. 291; and see Cooper v. Cooper, L. R. 6 Ch. 15, in which Grissell v. Swinhoe, L. R. 7 Eq. 291, is explained.

[1] Dillon v. Parker, 1 Swanst. 359, 376, 381, 394, and notes by Mr. Swanston, with the cases cited; Gretton v. Haward, 1 Swanst. 409, 413, 420, 425, 433, and notes with the cases cited; Noys v. Mordaunt, 2 Vern. 581; Streatfield v. Streatfield, Cas. t. Talb. 176, 1 Lead. Cas. Eq., 4th Am. ed., 503, 510, 541, and

§ 478. **Cases of Election Arising under Appointments in Pursuance of Powers.**— As cases of this description are very rare in the United States, a very brief and condensed treatment of the subject will suffice. Cases for an election may arise under appointments made in pursuance of powers. In the case of a void appointment by will to a stranger to the power, and a devise or bequest of the appointor's own property to the object of it, who takes also under the power as in default of appointment, such person must elect between what comes to him under the power from the default of a valid appointment, and the benefits conferred by the appointor's will.[1] [a] In order to raise a case of election, where the appointor appoints the property subject to the power to a stranger, he must give some property of *his own* to the object of the power;[2] for if no property be given but what is subject to the power, there is nothing out of which compensation can be made.[3] [b]

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cases cited in notes of the English and American editors; Blake v. Bunbury, 4 Brown Ch. 21; Villa Real v. Lord Galway, 1 Brown Ch. 292, note; Ardesoife v. Bennett, 1 Dick. 463; Whistler v. Webster, 2 Ves. 367; Ward v. Baugh, 4 Ves. 623; Lady Caven v. Pulteney, 2 Ves. 544, 560; Dashwood v. Peyton, 18 Ves. 27, 49; Welby v. Welby, 2 Ves. & B. 190; Lord Rancliffe v. Parkyns, 6 Dow, 149, 179; Ker v. Wauchope, 1 Bligh, 1, 25.[a] And see cases cited in previous notes.

[1] Whistler v. Webster, 2 Ves. 367; Tomkyns v. Blane, 28 Beav. 423; England v. Lavers, L. R. 3 Eq. 63; Reid v. Reid, 25 Beav. 469.

[2] In re Fowler, 27 Beav. 362.

[3] Bristowe v. Warde, 2 Ves. 336. In Coutts v. Ackworth, L. R. 9 Eq. 519, a lady, on her marriage, appointed three thousand pounds to trustees, the inter-

§ 477, (a) See, also, Moore v. Baker, 4 Ind. App. 115, 51 Am. St. Rep. 203, 30 N. E. 629. In Fitzhugh v. Hubbard, 41 Ark. 64, a testator gave to his brother an indebtedness due from him, and the remainder of his estate to his sister. This indebtedness had in fact been transferred by the testator before the execution of the will to the sister. Held, that the sister was bound to elect whether to confirm the will, or renounce and hold the debt.

§ 478, (a) See, also, White v. White, 22 Ch. Div. 555; In re Tancred's Settlement [1903], 1 Ch. 715. So, when a testatrix by her will, purporting to exercise a power of appointment which she erroneously supposed herself to possess, appointed property to which one J. was entitled to third persons, and by a codicil gave J. other property, over which she had full testamentary power, J. is put to an election whether to take under or against the will; In re Brooksbank, 34 Ch. Div. 160.

(b) See, to the same effect, Graham v. Whitridge (Md.), 57 Atl. 609.

§ 479. An object of two powers improperly excluded by an appointment under one is not debarred in consequence from claims upon the other, and no case of election arises. Thus if there are two powers, one exclusive and the other not, and there are several objects of both, an appointment of the whole fund under the exclusive power to A, who is an object of both powers, and an appointment of the whole fund under the non-exclusive power to other objects, excluding A, will not prevent A's sharing in the property disposable of by the second power, which had been defectively appointed by reason of his improper exclusion, and he is not bound to elect.[1] And where there are two powers, both exclusive, children *and* grandchildren being the objects of one, and children only of the other, and an appointment is made under the former to children only, and under the latter to children and a grandchild (who is not therefore an object), the children are not compellable to elect, in order to give effect to the void appointment to the grandchild.[2] A case of election will not arise if a testator appointor merely requests or directs the appointees, who are also legatees of other property, to give the appointed property to strangers to the power.[3] Nor will a case of election

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est to be paid to her husband for life, and after his decease the capital was to go over. The deed contained a power to revoke the trusts subsequent to the life estate of the husband. By her will, after marriage, she purported to revoke *all* the trusts of the deed, and gave one thousand pounds to her husband, and two thousand pounds to another person. It was held that the testatrix having revoked all the trusts of the deed, while the power of revocation only extended to the remainder after her husband's life estate, she had thus attempted to deal with his interest, and the husband was therefore obliged to elect between the one thousand pounds given him by the will and the interest on the three thousand pounds for his life given him by the original deed of appointment.

[1] In re Aplin, 13 Week. Rep. 1062.

[2] In re Fowler, 27 Beav. 362.

[3] Blackett v. Lamb, 14 Beav. 482. The reason of this rule was thus stated by Sir John Romilly, M. R.: "The superadded words used by the testator here neither are nor profess to be any appointment over the fund itself, but they purport to raise an obligation on the conscience of the person taking the benefit of the gift, to transfer that benefit, after his decease, to his children. I am of opinion that if the words had been used by the testator with reference to a

arise where the appointment is *absolute,* with a subsequent superadded direction or condition in favor of strangers.[4] But a case of election does arise where the testator directs that the legacies which he also gives to the appointees shall be *forfeited* if the direction as to the appointed fund is not complied with.[5]

§ 480. No case of election arises under a void appointment, where the appointor declares that he makes it only in case he has the power to do so.[1] An appointee under two appointments, one of which becomes inoperative, is not bound to elect between the well-appointed fund and an interest to which he becomes entitled, as next of kin to the appointor, in the ill-appointed fund which devolves on such next of kin in consequence of the appointment of it proving to be inoperative.[2] [a]

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fund which was wholly within his own control, *to deal with as he might think fit,* these words would have created a trust, and that his children, taking the gifts under the will of the testator, would have taken them charged with the duty of disposing of them according to that will."

[4] Woolridge v. Woolridge, 1 Johns. 63; Carver v. Bowles, 2 Russ. & M. 301; Churchill v. Churchill, L. R. 5 Eq. 44; Wollaston v. King, L. R. 8 Eq. 165; but see Moriarty v. Martin, 3 Ir. Ch. 26. In Woolridge v. Woolridge, 1 Johns. 63, the rule was laid down, "that where there was an absolute appointment by will in favor of a proper object of the power, and that appointment is followed by attempts to modify the interest so appointed in a manner which the law will not allow, the court reads the will as if all the passages in which such attempts are made were swept out of it for all intents and purposes." See Wallinger v. Wallinger, L. R. 9 Eq. 301.

[5] King v. King, 15 Ir. Ch. 479; Boughton v. Boughton, 2 Ves. Sr. 12.

[1] Church v. Kemble, 5 Sim. 525.

[2] Blaiklock v. Grindle, L. R. 7 Eq. 215; Rich v. Cockell, 9 Ves. 369.

(a) In Albert v. Albert, 68 Md. 352, 12 Atl. 11, A. had a power of appointment over the estate of his father, J., conferred upon him by J.'s will. In his own will, A. mingled his own and his father's estate, and created certain trusts which, as to the property comprised in the J. estate, were void on account of perpetuities. Held, that those beneficiaries as to whose shares the trusts were in part void would be required to elect whether to take, under the will of J., their proportion of the property of the J. estate, and relinquish all claim to participate in the estate of A., or to abide by the will of A. in its entirety. They could not claim both against and under the will. In In re Bradshaw [1902], 1 Ch. 436, W. B. by his will gave property upon trust for the children of A. B. as A. B. should by will appoint, and in default of appointment

§ 481. Cases of Election where a Testator has Attempted to Dispose of his Property by a Will Which is Ineffectual for That Purpose.— The cases falling under this head would arise where a testator had devised lands to a stranger, and had given a legacy to his own heir, but by reason either of the testator's personal incapacity, or of the imperfect execution of the will, or of some special legal rule, the devise to the stranger is void, so that the land included in it would descend, while the gift to the heir is valid. The question would then be presented, whether the heir may take both the land descending to him on account of the devise being void and the legacy, or whether he must elect between the two, on the ground that if he accepts the benefits given him, he must confirm the will entirely. The various circumstances which have given rise to cases of this sort are the following: The testator's personal incapacity, through infancy or coverture; the imperfect execution of the will, as one of lands; a will leaving some lands entirely undisposed of to descend to the heir, while it gives other benefits to the heir; a will executed in one country or state, and effectual to carry all the testator's property therein, but which does not, on account of its not using appropriate language, carry his property situated in another country or state; and a will which does not carry after-acquired lands. These cases will be separately examined in the order thus given. It is important to be remembered, however, in this connection, that modern legislation has removed most of the *occasions* upon which these cases can arise, and such questions will hereafter be infrequent. Thus in very many of the states, statutes have conferred upon infants and married women

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for the children equally. A. B. covenanted with the trustees of his marriage settlement to exercise the powers in a particular way. A. B. by his will made an appointment to his son for life with an appointment over which was void as transgressing the rule against perpetuities, and he also made a bequest of property of his own in favor of the son. The covenant was not satisfied by the terms of the will. Held, that A. B.'s son must elect between the interest bequeathed to him in the property of A. B and his interest in default of appointment under the will of A. B. Held also, that the covenant was void.

the same capacity to make wills of real and of personal estate, and have prescribed exactly the same mode of executing wills of real and of personal property, and have abolished the common-law rule which excluded after-acquired lands from the operation of a devise. This legislation has made it impossible for most of the cases above mentioned to arise in the states where it exists.

§ 482. **Infancy and Coverture of a Testator.**— The rule applicable under these circumstances depends upon the doctrine that, in order to create the necessity of election, there must be a disposition made or intended to be made by the donor by means of a *valid* instrument. As a universal proposition, an heir cannot be put to an election by the will of his ancestor, unless there is a disposition by a valid will; and it does not arise if the testator is incapacitated by infancy or coverture, or if he attempts to dispose of property by a will not duly executed.[1] No case of election will be raised where there is a want of capacity to devise real estate by reason of infancy. Prior to modern statutes, therefore, where an infant, whose will was valid as to personalty, but invalid as to the realty, devised his real estate to a stranger, and gave a legacy to his heir at law, the heir at law was not obliged to elect between this legacy and the lands which descended to him through the invalidity of the devise; he could take both.[2] On the same ground, a case of election did not arise from the incapacity of the testator by reason of coverture. Under the old law, the only will which it was possible for a married woman to make was one executed by way of appointment under a power bestowed upon her. Where, therefore, a married woman, acting under a power, made a valid appointment by will to her husband, and also in the same will bequeathed to a stranger certain personal property, over which the power did not extend, the husband was not put to an election, but could retain the fund appointed to him, and also claim the personal property which his wife had attempted to bequeath, and to which he was entitled by virtue of his right of succession as husband.[3] Neither of these cases could readily occur at present, since an infant has the same power by statute in most states to make a will of real and of personal estate, and a married woman is generally empowered to make a will of all her own property, real or personal.

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[1] Thellusson v. Woodford, 13 Ves. 223; Gardiner v. Fell, 1 Jacob & W. 22.

[2] Hearle v. Greenbank, 3 Atk. 695, 715, 1 Ves. Sr. 298; Brodie v. Barry, 2 Ves. & B. 127; Sheddon v. Goodrich, 8 Ves. 481; Snelgrove v. Snelgrove, 4 Desaus. Eq. 274; Melchor v. Burger, 1 Dev. & B. Eq. 634; Kearney v. Macomb, 16 N. J. Eq. 189; Tongue v. Nutwell, 17 Md. 212, 229, 79 Am. Dec. 649; Jones v. Jones, 8 Gill, 197.

§ 483. **Will Valid as to Personal Estate, but Invalid as to Lands.**— The cases now to be considered are those in which the testator had full capacity to dispose of all his property, but by reason of his not complying with some rule of the law as to mode of execution or form of description, the will proved to be inoperative with respect to certain kinds of his property, which property therefore descended to his heir or devolved upon his successors, as in the absence of any will. Prior to statutes comparatively modern, a will of freehold estates in land required certain formalities in its execution, which were not necessary to the validity of a will of personal property. Under that condition of the law, it was a well-settled rule that where a testator, by a will not executed with the formalities requisite to pass freehold estates in land, purported to devise such freehold estates away from his heir to a stranger, and by the same will gave a legacy to his heir, the heir was not obliged to elect, but could take both the legacy and the lands which descended to him, notwithstanding the attempted devise. In other words, the law would not, in the absence of any *express* condition inserted in the will by the testator himself, impose any *implied* condition upon the heir, and thus compel him to carry out the supposed intent of the testator by conforming to all the dispositions of the will.[1] This rule, however, does not apply where the legacy is given to the heir upon an express condition that if he disputes or does not comply with the whole of the will, he shall forfeit all benefit under it. In that case the condition is binding upon the heir, and if he accepts the legacy, he cannot claim the descended lands. This result, however, is not properly referable to the doctrine of election; it is merely a case of a gift with a condition annexed to it, so that unless the condition is fulfilled the gift is wholly inoperative.[2] [a] The principal rule stated above, at the commencement of this paragraph, has become practically obsolete in the United States, as well as in England,[3] since by statutes the same modes of execution have been prescribed for wills of real and of personal property.

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[3] Rich v. Cockell, 9 Ves. 369; Blaiklock v. Grindle, L. R. 7 Eq. 215; and see the American cases cited in the last preceding note.

§ 484. **Will Invalid in Another Country or State.**— There is a second case which may and does arise in this country and in England, having been affected by no statute. A testator has property situated in two states or countries; he makes a will, the language of which, either by general or particular description, applies to both classes of property, by which he devises his lands away from his heir to a stranger, and at the same time gives a legacy or other benefit to his heir; the will is valid and operative by the law of the state or country in which it is made, so that all the testator's property situated therein is effectively disposed of; but, either from the neglect of proper modes of execution, or of the requisite form of description or disposition, the will is not valid and operative by the law of the other state or country to carry the lands of the testator situated therein; the attempted devise of the lands situated in that other country or state is therefore void, and the lands themselves descend to the heir at law. The question presented upon these facts is, whether the heir is bound to elect between the gift contained in the will and the descended lands, or whether he may retain both. It will be seen from the numerous decisions — English and American — that the answer to this question is made to depend upon a second, namely, whether the testator, by the language of description and disposition being sufficiently specific as applied to the foreign lands, has shown a clear intent to include those lands in his devise to the stranger; or, from his using more general language in describing the subject-matter dealt with, the testator has shown an intent, according to the settled rules of interpretation, to confine the operation of his will to the property situated in the first state or country where the will was made, and which property *he had the power to dispose of by means of that will.* This is one of the cases to which the general rule of interpretation laid down in section 473 is constantly applied by the courts. The cases in England have generally arisen upon wills made in England, and valid with respect to the testator's property situated there, but invalid according to the peculiar law of Scotland, so that they were inoperative to carry the testator's heritable property, or landed estates, lying in that country. The English courts have settled the two following conclusions: If the language by which the testator describes and disposes of his property is general in its terms, and makes no specific reference to his Scotch heritable property, and contains no words or phrases which, by a reasonable interpretation, necessarily refer to such property, then the general rule of construction governs the case, that the testator must be assumed to have intended to confine the dispositions to the property which he had the power to dispose of *by that will*,— namely, the English property. The Scotch heritable property is not disposed of, and was not intended to be disposed of, and the heir is not put to an election. In short, the case falls under the familiar rule stated in the last paragraph.[1] If, on the other hand, the testator makes an express reference to his Scotch property, or uses such specific language of description, that, upon a reasonable interpretation, he must have intended such a reference, and a clear intention is thereby shown to dispose of the Scotch as well as the English estate, then, although the disposition is void with respect to the Scotch heritable property, the heir at law is compelled to elect between this property thus descending to him, and the benefits conferred upon him by the will.[2] Similar cases have arisen in this country upon wills executed in one state, and valid for all purposes by the law thereof, but not valid as effective devises of land by the law of another state in which was situate real property owned by the testator. The same twofold rule has been adopted and enforced by the American courts; and it is plain that such cases may constantly arise from the varying legislation of different commonwealths.[3]

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[1] Sheddon v. Goodrich, 8 Ves. 481; Gardiner v. Fell, 1 Jacob & W. 22; Thellusson v. Woodford, 13 Ves. 220, 221; Wilson v. Wilson, 1 De Gex & S. 152; Kearney v. Macomb, 16 N. J. Eq. 189; Tongue v. Nutwell, 17 Md. 212, 219; 79 Am. Dec. 649; Jones v. Jones, 8 Gill, 197; Melchor v. Burger, 1 Dev. & B. Eq. 634; McElfresh v. Schley, 1 Gill, 181. While acknowledging this rule to be firmly established, able judges have expressed a strong opinion against its soundness in principle, viz.: Lord Eldon, in Sheddon v. Goodrich, 8 Ves. 481, 496; Sir William Grant, in Brodie v. Barry, 2 Ves. & B. 127; and Lord Kenyon, in Cary v. Askew, 1 Cox, 241.

[2] It seems also that the condition may be shown from the whole tenor and form of the disposition, provided it shows a clear intent of the testator that the legacy depends upon the carrying out of his other attempted gifts: Boughton v. Boughton, 2 Ves. Sr. 12; Sheddon v. Goodrich, 8 Ves. 481, 496, per Lord Eldon; Melchor v. Burger, 1 Dev. & B. Eq. 634; Snelgrove v. Snelgrove, 4 Desaus. Eq. 274, 300; Jones v. Jones, 8 Gill, 197; Kearney v. Macomb, 16 N. J. Eq. 189; McElfresh v. Schley, 1 Gill, 181; Nutt v. Nutt, 1 Freem. Ch. 128.

[3] Lord Langdale's Act, concerning wills, 1 Vict., c. 26.

(a) The text is cited to this effect in Fifield v. Van Wyck, 94 Va. 557, 563, 64 Am. St. Rep. 745, 27 S. E. 446.

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[1] Maxwell v. Maxwell, 2 De Gex, M. & G. 705; 16 Beav. 106; Johnson v. Telford, 1 Russ. & M. 244; Allen v. Anderson, 5 Hare, 163; Maxwell v. Hyslop, L. R. 4 Eq. 407; Lamb v. Lamb, 5 Week. Rep. 720. In Maxwell v. Maxwell, 2 De Gex, M. & G. 705, the language of description and gift was, "all my real and personal estate, whatsoever and *wheresoever*." See extract from opinion, *ante*, § 474, note. In Johnson v. Telford, 1 Russ. & M. 244, the testator "gave, devised, and bequeathed all and every his real and personal estate whatsoever and wheresoever, which he was or should be seised or possessed of or entitled to." In Allen v. Anderson, 5 Hare, 163, the testator devised "all the rest and residue of his real, personal, and mixed estates, whatsoever and wheresoever," etc. Held, this did not apply to a Scotch "heritable bond," which, by Scotch law, descended to the heir at law, and the heir was not bound to elect between the bond and the benefits under the will. In Maxwell v. Hyslop, L. R. 4 Eq. 407, the testator gave "all the residue of his real and personal estate," and this was held not to apply to a Scotch estate which descended to the heir.

[2] Brodie v. Barry, 2 Ves. & B. 127; Orrell v. Orrell, L. R. 6 Ch. 302; Dewar v. Maitland, L. R. 2 Eq. 834; McCall v. McCall, Dru. 283, per Lord Chancellor Sugden. In Brodie v. Barry, 2 Ves. & B. 127, the language of the devise was, "all my estate, freehold, leasehold, copyhold, and other estates whatever, and wheresoever situated, in England, *Scotland*, and elsewhere," and Sir William Grant held that the intent was unmistakable to dispose of the Scotch estates as well as the English, and therefore it was a case for an election. In Orrell

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v. Orrell, L. R. 6 Ch. 302, the language was, "all the residue of my real estate, *situate in any part of the United Kingdom* or elsewhere." The testator left estates in England and Scotland, but none in Ireland or Wales. The court of appeal held that the intention to dispose of the Scotch property was sufficiently clear to require an election. This case unquestionably lies very near if not on the line which separates the two classes. See *ante*, § 474, note, where it is given more at large. In Dewar v. Maitland, L. R. 2 Eq. 834, the will, in express terms, devised estates in England and in the colony of St. Kitts, but being attested by only two witnesses, it was not effectual to pass the land in St. Kitts by the colonial law. The rule was applied requiring the heir to elect between the lands thus descending to him, and the gifts made to him by the will.

[3] Jones v. Jones, 8 Gill, 197; Kearney v. Macomb, 16 N. J. Eq. 189; Van Dyke's Appeal, 60 Pa. St. 481, 489. In Jones v. Jones, 8 Gill, 197, the will was made in Pennsylvania, and was valid there; but was not valid as a will of land in Maryland, because it was not executed in the presence of three witnesses. The court held that the heir was not bound to elect, but could claim the Maryland land inherited by him, and retain the legacy given by the will. In Van Dyke's Appeal, 60 Pa. St. 481, 489, the opinion of Mr. Justice Sharswood is such an able and exhaustive discussion of the doctrine as applied under these and analogous circumstances that I shall quote from it at some length. The testator gave legacies to his daughters which exhausted nearly all of his property in Pennsylvania, and gave his real estate in New Jersey to his sons. The will was valid in Pennsylvania, but not executed so as to be an effective will of lands in New Jersey. The daughters, therefore, unless compelled to elect, would receive all the Pennsylvania property as legatees, and their proportionate shares of the New Jersey estate as heirs. The sons brought a suit in equity to compel an election, and a conveyance of the estate in conformity with the will. Sharswood, J., after holding that the case was plainly one of equitable cognizance, falling within the equitable jurisdiction over trusts, said: "It may certainly be considered as settled in England that if a will purporting to devise real estate, but ineffectually, because not attested according to the statute of frauds, gives a legacy to the heir at law, he cannot be put to his election: Hearle v. Greenbank, 3 Atk. 695; Thellusson v. Woodford, 13 Ves. 209; Buckeridge v. Ingram, 2 Ves. 652; Sheddon v. Goodrich, 8 Ves. 482. These cases have been recognized and followed in this country: Melchor v. Burger, 1 Dev. & B. Eq. 634; McElfresh v. Schley, 2 Gill, 181; Jones v. Jones, 8 Gill, 197; Kearney v. Macomb, 16 N. J. Eq. 189. Yet it is equally well established that if the testator annexed an express condition to the bequest of the person-

§ 485. **Will Devising After-acquired Lands.**— Still another case frequently arose under the former condition of the law, but which has become obsolete from the effect of modern legislation upon the construction and operation of wills, namely, that of after-acquired lands purporting to be

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alty, the duty of election will be enforced: Boughton v. Boughton, 2 Ves. Sr. 12; Whistler v. Webster, 2 Ves. 367; Ker v. Wauchop, 1 Bligh, 1; McElfresh v. Schley, 2 Gill, 181. That this distinction rests upon no sufficient reason has been admitted by almost every judge before whom the question has arisen. Why an express condition should prevail, and one, however clearly implied, should not, has never been and cannot be satisfactorily explained. It is said that a disposition absolutely void is no disposition at all, and being incapable of effect as such, it cannot be read to ascertain the intent of the testator. But an express condition annexed to the bequest of the personalty does not render the disposition of the realty valid; it would be a repeal of the statute of frauds so to hold. How, then, can it operate any more than an implied condition to open the eyes of the court, so as to enable them to read those parts of the will which relate to the realty? and without a knowledge of what they are, how can the condition be enforced?" He then quotes the language of several eminent judges, in which they express a strong dissent from the soundness of this distinction, in accordance with his own views, although admitting that it had become settled, viz., of Lord Kenyon, M. R., in Cary v. Askew, 1 Cox, 241; and of Sir William Grant, in Brodie v. Barry, 2 Ves. & B. 127; and of Lord Eldon, in Ker v. Wauchop, 1 Bligh, 1, and Sheddon v. Goodrich, 8 Ves. 482; and then proceeds: "Mr. Justice Kennedy has expressed the same opinion: 'When a condition is necessarily implied by a construction in regard to which there can be but one opinion, there can be no good reason why the result or decision of the court should not be the same as in the case of an express condition, and the donee bound to make an election in one case as well as in the other': Philadelphia v. Davis, 1 Whart. 510. There is another class of cases in England wholly irreconcilable with this shadowy distinction; for the heir at law of a copyhold was formerly put to his election, though there had been no surrender to the use of the will. This was previous to 55 Geo. III., c. 192; 1 Lead. Cas. Eq. 239, note; yet, as Sir William Grant has remarked, 'a will, however executed, was as inoperative for the conveyance of freehold estates': Brodie v. Barry, 2 Ves. & B. 130. The precise point can never arise in this state, for, happily, our statute of wills wisely provides that the forms and solemnities of execution and proof shall be the same in all wills, whether of realty or personalty. The case before us is of a will duly executed according to the laws of Pennsylvania, devising lands in New Jersey, where, however, it is invalid as to the realty, by not having three subscribing witnesses. A court of New Jersey might hold themselves, on these authorities, bound to shut their eyes on the devise of the realty, and consider it as though it were not written, and so they have held: Kearney v. Macomb, 16 N. J. Eq. 189. They might feel themselves compelled to say, with Lord Alvanley, however absurdly it sounds: 'I cannot read the will without the word "real" in it; but I can say, for the statute enables me, and I am bound to say, that if a man, by a will unattested, gives both devised by the testator, but in reality descending to the heir. Previous to the modern statutes on the subject, a will of real estate invariably spoke from the date of its execution, and not from the testator's death. A testator could not, by any form of words, however explicit and mandatory,

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real and personal estate, he never meant to give the real estate': Buckeridge v. Ingram, 2 Ves. 652. But a statute of New Jersey has no such moral power over the conscience of a court of Pennsylvania, to prevent it from reading the whole will upon the construction of a bequest of personalty within its rightful jurisdiction. We are dealing only with the bequests of personalty, and the simple question is, whether the testator intended to annex to them a condition. If without making any disposition whatever of the New Jersey estates, dying intestate as to them, he had annexed an express proviso to the legacies to his daughters, that they should release to their brothers all their right and title as heirs at law to these lands, it is, of course, indubitable that such a condition would have been effectual. We are precluded by no statute to which we owe obedience from reading the whole will, and if we see plainly that such was the intention of the testator, from carrying it into effect." The learned judge then cites and quotes from the facts and opinions in the English cases upon wills of estates situate in Scotland, which are referred to in the preceding note, viz.: Brodie v. Barry, 2 Ves. & B. 127; Maxwell v. Maxwell, 2 De Gex, M. & G. 705, and McCall v. McCall, Dru. 283, per Lord Chancellor Sugden; and proceeds: "In this state of the authorities we are clear in holding that we are not precluded by force of the New Jersey statute from reading the whole will of the testator, in order to ascertain his intention in reference to his bequest of the personalty now in question. We are equally clear that it is a case for election. The intention of the testator does not rest merely upon the implication arising from his careful division of his property among his children in different classes, but he has indicated it in words by the clause, 'I direct and enjoin on my heirs that no exception be taken to this will, or any part thereof, on any legal or technical account.' It is true that for want of a bequest over, this provision would be regarded as *in terrorem* only, and would not induce a forfeiture: Chew's Appeal, 45 Pa. St. 228. But, as has been often said, the equitable doctrine of election is grounded upon the ascertained intention of the testator, and we can resort to every part of the will to arrive at it. 'The intention of the donor or testator ought doubtless to be the pole-star in such cases; and wherever it appears from the instrument itself conferring the benefit, with a certainty that will admit of no doubt, either by express declaration or by words that are susceptible of no other meaning, that it was the intention of the donor or testator that the object of his bounty should not participate in it without giving his assent to everything contained in the instrument, the donees ought not to be permitted to claim the gift, unless they will abide by the intention and wishes of its author': Philadelphia v. Davis, 1 Whart. 510, per Kennedy, J. This, however, is not the only mode in which the equity of the case can be reached. The doctrine of equitable election rests upon the principle of compensation, and not of forfeiture, which applies only to the non-performance of an express condidevise any lands of which he should become seised, or which he should purchase or acquire in any other manner, after the execution of the will; the devise was wholly void, and the land descended to his heir. A question as to election by the heir was therefore presented by such a will, and exactly the same twofold rule was established by the decisions as in the case of a will purporting to devise estates situate in another country, but inoperative for that purpose. If the testator showed, by the language of description and gift, a clear intention to dispose of his after-acquired lands to a stranger, and by the same will gave some benefit to his heir, then the heir was obliged to elect between these after-acquired estates which would descend to him and the benefits conferred by the will; and this rule applied both to lands actually purchased after the date of the will and to those *contracted* to be purchased.[1] The converse of the rule was also well settled. If the words of description and gift were general, and not clearly pointing to after-acquired land, so that the testator's intention to dispose of such estates was not certain, was equivocal, there was no case for an election.[2] The same double rule has been adopted and en-

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tion. Besides, no decree of this court could authorize the guardians of the minors to execute releases of their right and title to the New Jersey lands, which would be effectual in that state. The alternative relief prayed for in the bill is that which is most appropriate to the case." It was decreed that the sons — devisees — should receive out of the personal property bequeathed to the defendants — daughters — sums equal in value to the shares of the real property in New Jersey, which descended to the daughters, but which would have vested in the sons, if the will had been operative on such lands. This admirable judgment of Mr. Justice Sharswood is in perfect harmony with the decision of the English court in Brodie v. Barry, 2 Ves. & B. 127, Orrell v. Orrell, L. R. 6 Ch. 302, and cases of that kind, since the devise of the New Jersey lands was made in express, specific terms of description and gift, and was not merely inferred from such general words as "all my real estate, whatever and wheresoever," and the like.

[1] Churchman v. Ireland, 1 Russ. & M. 250; 4 Sim. 520; Abdy v. Gordon, 3 Russ. 278; Schroder v. Schroder, Kay, 571, 578; 18 Jur. 987; 24 L. J. Ch., N. S., 510, 513; Hance v. Truwhitt, 2 Johns. & H. 216; Greenwood v. Penny, 12 Beav. 403; Thellusson v. Woodford, 13 Ves. 209, 211; *sub nom.* Rendlesham v. Woodford, 1 Dow. 249.

[2] Johnson v. Telford, 1 Russ. & M. 244; Back v. Kett, Jacob, 534; and see Plowden v. Hyde, 2 De Gex, M. & G. 684, 687.

forced, under like circumstances, by the American courts.[3] These questions cannot hereafter arise; for the rule itself has been rendered obsolete by the English statute,[4] and by legislation of the American states, which have altered the common-law doctrine, and have enacted that wills of real estate as well as of personal property shall speak from the time of the testator's death, and shall therefore carry after-acquired lands.

§ 486. **Will of Copyholds.**— Finally, a peculiar case arose in the English law, growing out of the species of estate and tenure known as copyhold, which should be briefly mentioned. Previously to the act 55 Geo. III., c. 192,[1] devised copyholds could only pass where they had been previously *surrendered* to the use of the owner's will. Whenever, therefore, a testator purported to devise unsurrendered copyhold property, it descended for want of a surrender to the heir, and a question arose whether such heir could claim both a legacy under the will and also the copyhold property. It was held in analogy with the cases described in the last two paragraphs, that if the testator showed an intent to dispose of the copyholds by his will, the heir was put to an election;[2] but if the devise was merely general in its form, and thus did not indicate a plain intention to include the copyholds, no necessity for an election existed.[3] This matter has been swept into oblivion by modern reformatory legislation in England, and of course never had any existence in this country.[4]

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§ 485, [3] It must be conceded, however, that there is some conflict of opinion in the reasoning and conclusions of the few American decisions which have dealt with this question. The English rule was adopted, and the necessity of an election was distinctly affirmed, where the intent to dispose of after-acquired lands is clear, in McElfresh v. Schley, 2 Gill, 181; but see, for contrary reasoning and *dicta*, Philadelphia v. Davis, 1 Whart. 490. It is abundantly settled that there is no case for an election, if the intent to devise the after-acquired lands is not clear: Philadelphia v. Davis, 1 Whart. 490, 503; Hall v. Hall, 2 McCord Eq. 269, 299, 306.

§ 485, [4] 1 Vict., c. 26, sec. 24.

§ 486, [1] Mr. Preston's Act.

§ 486, [2] Highway v. Banner, 1 Brown Ch. 584; Rumbold v. Rumbold, 3 Ves. 65; Pettiward v. Prescott, 7 Ves. 541; Unott v. Wilkes, Amb. 430; 2 Eden, 187.

§ 486, [3] Judd v. Pratt, 13 Ves. 168; 15 Ves. 390.

§ 487. **Second Class.**— Cases where property is given to B, in which the donor has only a partial interest, and a partial interest in it is held by A, and by the same instrument other property of the donor is conferred upon A. This class includes among others the particular cases in which the donor has only an undivided share in the property given; where he has only a future interest in it, as, for example, a remainder or reversion in fee; where it is subject to encumbrances or charges held by a party who also receives benefits; where a widow is entitled to dower, and is a devisee or legatee under her husband's will; and where a widow has an interest in "community property," and receives benefits by her husband's will.

§ 488. **General Doctrine.**— The general doctrine which governs this class of cases has already been stated and illustrated.[1] [a] Where the testator has a partial interest in the property devised or bequeathed by his will, the necessity of an election is always much less apparent than where he purports to bestow property in which he has no interest whatever. In such cases it is a settled rule that courts will lean as far as possible in favor of an interpretation which shows an intention of the testator to give only the interest, estate, or share which he is enabled, by virtue of his own right, to deal with, or to give the property in its present condition, subject to all existing encumbrances and charges upon it. It requires a strong, unequivocal expression or indication of an intent on the part of the testator to bestow the entire property, and not simply his own interest in it, or to bestow the property freed from its encumbrances and charges, in order to raise the necessity for an election.[2] [b] The affirmative branch of the rule is equally well settled, that if a testator is only entitled to a partial interest in the property, as where he owns an undivided share, or a future estate, or holds the property subject to some encumbrance or charge, and uses language of description and donation, which shows an unmistakable intention on his part to dispose of the entire property, or the property free from the existing encumbrance or charge, and if the owner of the other part or

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[4] These cases, however, and especially the last named (Judd v. Pratt, 13 Ves. 168; 15 Ves. 390) may be instructive upon the more important question, How far does general language of description and donation in a will show an intent on the part of the testator to deal with and dispose of a subject over which he has no power of disposition,— e. g., a partial interest, wife's dower, etc.,— and thus to raise a case of election? Many of the English and American decisions cited in the foregoing paragraphs upon wills devising land in another country, or after-acquired land, or copyholds, are extremely important and useful in questions of daily occurrence concerning election with respect to dower, undivided shares owned by the testator, and all other instances of a partial interest disposed of by means of general descriptive language. It is for this reason that I have stated the rules in the text, and the principles upon which they were rested, although the rules themselves have been abrogated by modern legislation.

[1] See *ante*, §§ 473, 474, and note.

(a) The text, §§ 488–493, is cited in Pratt v. Douglas, 38 N. J. Eq. 516, 536.

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[2] Lord Rancliffe v. Lady Parkyns, 6 Dow, 185; Birmingham v. Kirwan, 2 Schoales & L. 444; Maddison v. Chapman, 1 Johns. & H. 470; Wintour v. Clifton, 8 De Gex, M. & G. 641, 650; Padbury v. Clark, 2 Macn. & G. 298; Dummer v. Pitcher, 5 Sim. 35; 2 Mylne & K. 262; Shuttleworth v. Greaves, 4 Mylne & C. 35; Stephens v. Stephens, 1 De Gex & J. 62; Wilkinson v. Dent, L. R. 6 Ch. 339; Grissell v. Swinhoe, L. R. 7 Eq. 291; Havens v. Sackett, 15 N. Y. 365; Lewis v. Smith, 9 N. Y. 502; 61 Am. Dec. 706; Adsit v. Adsit, 2 Johns. Ch. 448; 7 Am. Dec. 539; Bull v. Church, 5 Hill, 206; Fuller v. Yates, 8 Paige, 325; Sandford v. Jackson, 10 Paige, 266; Vernon v. Vernon, 53 N. Y. 351; Lefevre v. Lefevre, 59 N. Y. 435; Reed v. Dickerman, 12 Pick. 146; Morrison v. Bowman, 29 Cal. 337, 348; Peck v. Brummagim, 31 Cal. 440, 447; 89 Am. Dec. 195; De Godey v. Godey, 39 Cal. 157, 164; In re Buchanan's Estate, 8 Cal. 507; Beard v. Knox, 5 Cal. 252; 63 Am. Dec. 125; Burton v. Lies, 21 Cal. 91; In re Silvey's Estate, 42 Cal. 211. In the case of Havens v. Sackett, 15 N. Y. 365, the doctrine is stated in so admirably clear and accurate a manner by Denio, C. J., that I shall quote from his opinion at some length. One Havens, the testator, being entitled, under the will of a deceased brother, to certain bank stocks, in case he should survive that brother's widow, bequeathed. by a codicil of his own will, to the plaintiff, "the stocks given to me by my said brother after the decease of his widow." The testator also, by the same codicil, devised certain lands which he confessedly owned to his children, the defendants. The will of the testator's brother had given those same stocks to the testator's children (the defendants), in case their father should not survive the brother's widow. In fact, the testator died before the brother's widow, so that the bequest to the plaintiff of the stocks became nugatory, and they belonged to the defendants under the provisions of their uncle's will. The plaintiff claimed that the defendants were bound to elect between the land given them by the will and the stocks which came to them under their uncle's will, but which their father had bequeathed to the plaintiff. The court of appeals, reversing the judgment of the supreme court, held that there

(b) The text is cited to this effect in Pratt v. Douglas, 38 N. J. Eq. 516, 536; Toney v. Spragins, 80 Ala. 541. See, also, In re Gilmore, 81 Cal. 240, 22 Pac. 655; Sherman v. Lewis, 44 Minn. 107, 46 N. W. 318.

was no necessity for an election. Denio, C. J., after stating the general rule as follows: "One who accepts a benefit under a deed or will must adopt the whole contents of the instrument, conforming to all its provisions and renouncing every right inconsistent with it; for example, if a testator has affected to dispose of property not his own, and has given a benefit to the person to whom that property belongs, the legatee or devisee accepting the benefit so given to him must make good the testator's attempted disposition," — proceeded to apply the doctrine: "If the codicil can be so read that it shall appear that the testator intended only to dispose of his own contingent interest, or in other words, to dispose of the stock on condition that it should come to him by his surviving his sister-in-law, and that he did not attempt to do more, then it cannot be said that the plaintiff is disappointed by the defendants claiming their share of the stock, and the rule does not apply. Among the numerous cases which I have examined, I do not find any which presents this feature. It is indeed laid down that, in order to furnish a case for compelling an election, it must appear clearly and certainly that the interest attempted to be disposed of was such as the testator did not own. A person, it is said, is not, without strong indications of such an intent, to be understood as dealing with that which does not belong to him." He cites Dummer v. Pitcher, 2 Mylne & K. 262, 5 Sim. 35, stating the facts and decision of the court, and then proceeds: "The numerous class of cases in which a provision has been made for a wife by will, and not expressed to be in lieu of dower, and where the real estate has been devised to another by the same will, afford some light upon this question. At the first sight, a devise of a piece of land, or the direction in a will that a particular parcel of real estate should be sold to raise legacies, would seem to be hostile to the idea of a life estate existing in another in one third of the same land; and therefore, where in such cases the will makes a provision for the wife, it would appear to be within the rule requiring her to elect, though it should not be stated in terms that the provision was in lieu of dower. But the courts have held that such a devise or direction is not inconsistent with or repugnant to the claim of dower, and hence that the husband is not in such cases to be understood to have attempted to dispose of the dower estate of the wife. The right of dower is a title paramount to that of the husband, and when he devises the land, though without any qualifying words, an exception of the wife's right to dower is implied;" citing Adsit v. Adsit, 2 Johns. Ch. 448; 7 Am. Dec. 539; Church v. Bull, 2 Denio, 430; 43 Am. Dec. 754; 5 Hill, 207.

holder of the encumbrance or charge also receives benefits under the will, then a case for an election by such beneficiary is presented. The grounds of the election in such cases were accurately stated by Lord Redesdale in a decision which has since been regarded as leading: "The general rule is, that a person cannot accept and reject the same instrument, and this is the foundation of the law of election, on which courts of equity have grounded a variety of decisions in cases both of deeds and of wills."[3] This being the true criterion, it follows that, in order to create the necessity of an election in such cases, the dispositions of the will must so clearly indicate the testator's intention to give something more than his own partial interest, that the enjoyment by the donee of the benefits conferred upon him, without carrying out the other provisions, would be an acceptance and a rejection at the same time of the same instrument.[4][c] I shall now show the manner in which these general doctrines have been applied to various particular conditions of fact, and the special rules which have been established with reference thereto.

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[3] Birmingham v. Kirwan, 2 Schoales & L. 444, 449. The question was, whether a widow was put to an election between a bequest contained in her husband's will and her dower estate in his lands which had been devised away. Lord Redesdale held that it is not necessary to use express words of exclusion, in order to put the widow to an election; but that a person cannot both accept and reject the same instrument, and if, from the whole will taken together, it was the manifest intention that the testamentary provision should be received in lieu of dower, it would make an election necessary. But the language of the will must not be doubtful nor ambiguous.

[4] Parker v. Sowerby, 4 De Gex, M. & G. 321; Padbury v. Clark, 2 Macn. & G. 298; Wintour v. Clifton, 8 De Gex, M. & G. 641. 21 Beav. 447; Howells v. Jenkins, 1 De Gex, J. & S. 617, 2 Johns. & H. 706; Stephens v. Stephens, 1 De Gex & J. 62; Dummer v. Pitcher, 2 Mylne & K. 262; 5 Sim. 35; Shuttleworth v. Greaves, 4 Mylne & C. 35; Wilkinson v. Dent, L. R. 6 Ch. 339; Grosvenor v. Durston, 25 Beav. 97; Usticke v. Peters, 4 Kay & J. 437; Fitzsimmons v. Fitzsimmons, 28 Beav. 417; Miller v. Thurgood, 33 Beav. 496; Bull v. Church, 5 Hill, 207; 2 Denio, 430; 43 Am. Dec. 754; Fuller v. Yeates, 8 Paige, 325; Sandford v. Jackson, 10 Paige, 266; Vernon v. Vernon, 53 N. Y. 351; Savage v. Burnham, 17 N. Y. 561, 577; Leonard v. Steele, 4 Barb. 20; Lewis v. Smith, 9 N. Y. 502; 61 Am. Dec. 706; Mills v. Mills, 28 Barb. 454; Morrison v. Bowman, 29 Cal. 348; Chapin v. Hill, 1 R. I. 446; Collins v. Carman, 5 Md. 503; Stark v. Hunton, 1 N. J. Eq. 216; Higginbotham v. Cornwell, 8 Gratt. 83; 56 Am. Dec. 130; Douglas v. Feay, 1 W. Va. 26; Hyde

(c) Brown v. Ward, 103 N. C. 178, 9 S. E. 300 (owner of life interest devises the fee); Ditch v. Sennott, 117 Ill. 362, 7 N. E. 640.

§ 489. **The Donor Owns only an Undivided Share of the Property.**— If a testator owning an undivided share uses language of description and donation which may apply to and include the whole property, and by the same will gives benefits to his co-owner, the question arises whether such co-owner is bound to elect between the benefits conferred by the will and his own share of the property. *Prima facie* a testator is presumed to have intended to bequeath that alone which he owned,— that only over which his power of disposal extended. Wherever, therefore, the testator does not give the whole property *specifically*, but employs *general words* of description and donation, such as "all my lands," and the like, it is well settled that no case for an election arises, because there is an interest belonging to the testator to which the disposing language can apply, and the *prima facie* presumption as to his intent will control.[1][a] On the other hand, if the testator devises the prop-

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v. Baldwin, 17 Pick. 303, 308; Smith v. Guild, 34 Me. 443, 447; Weeks v. Patten, 18 Me. 42; 36 Am. Dec. 696; George v. Bussing, 15 B. Mon. 558; Apperson v. Bolton, 29 Ark. 418; Alling v. Chatfield, 42 Conn. 276; Brown v. Brown, 55 N. H. 106; Cox v. Rogers, 77 Pa. St. 160; Young v. Pickens, 49 Ind. 23; Metteer v. Wiley, 34 Iowa, 214; Colgate v. Colgate, 23 N. J. Eq. 372; Worthen v. Pearson, 33 Ga. 385; 81 Am. Dec. 213.

[1] Dummer v. Pitcher, 2 Mylne & K. 262; Usticke v. Peters, 4 Kay & J. 437; Miller v. Thurgood, 33 Beav. 496, per Lord Romilly, M. R.; Rancliffe v. Parkyns, 6 Dow, 149. In Miller v. Thurgood, 33 Beav. 496, a testator owned a freehold lease in Potter Street and another in South Street, and an undivided two thirds of a house and of eighteen cottages in South Street, the other third belonging to his wife. He devised all his freehold, messuages, cottages, etc., in the two streets, specifically mentioning them, to his wife for her life, and after her death to his children in fee. Lord Romilly held that she was bound to elect between her one third of the house and cottages, and the benefits given by the will. He said: "If the testator had devised his property

(a) The text is cited in Penn v. Guggenheimer, 76 Va. 839, 847; Pratt v. Douglas, 38 N. J. Eq. 516, 538; In re Gotzian, 34 Minn. 159, 57 Am. Rep. 43, 24 N. W. 920; Toney v. Spragins, 80 Ala. 541. See, also, In re Gilmore, 81 Cal. 240, 22 Pac. 655; Haack v. Weicken, 118 N. Y. 75, 23 N. E. 133.

erty *specifically* by language indicating a specific gift of the property, an election becomes necessary. It seems now to be settled by the more recent English decisions that when the owner of an undivided share devises or bequeaths the property by words of description and donation importing an intent to give the *entirety,* then a case of election is raised against the other co-owner who receives a benefit under the same will.[2] [b] The conclusion which is plainly

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in these terms, 'all and every my freeholds in Potter Street and South Street, and elsewhere,' I should be of opinion that no case for an election arose. But he specifically points to his cottages in South Street," etc.

[2] Shuttleworth v. Greaves, 4 Mylne & C. 35; Miller v. Thurgood, 33 Beav. 496; Padbury v. Clark, 2 Macn. & G. 298; Fitzsimmons v. Fitzsimmons, 28 Beav. 417; Grosvenor v. Durston, 25 Beav. 97; Howells v. Jenkins, 2 Johns. & H. 706; Grissell v. Swinhoe, L. R. 7 Eq. 291, 295; Wilkinson v. Dent, L. R. 6 Ch. 339. In Padbury v. Clark, 2 Macn. & G. 298, a testator owned an undivided half of a certain house, and one Mary Cox owned the other half. He devised "all that my freehold, messuage, and tenement, with the garden and all the appurtenances, situate at Tottenham, and now on lease to T. Upton," to the plaintiff, and gave certain bequests to Mary Cox. Lord Cottenham held that this language showed a clear intention to devise the house as an entirety, and put Mary Cox to an election. In Howells v. Jenkins, 2 Johns. & H. 706, a testator, owning an undivided half of two farms, another undivided fourth of which belonged to W., devised one of these farms to E. and W., and W. was held bound to elect. In Grosvenor v. Durston, 25 Beav. 97, a testator, having certain public funds which stood in the joint names of himself and his wife, bequeathed away his funded stock generally, and also made a provision for his widow; she was put to her election. In Grissell v. Swinhoe, L. R. 7 Eq. 291, 295, a testator was entitled to one half of a fund and a certain lady was entitled to the other half. In his will, after reciting that he was entitled to the whole fund, he purported to bequeath the whole and to give one half of it to the husband of the lady, who was really owner of the other half. This husband had become administrator of his wife on her death, and succeeded to her half by virtue of his administration. The court held that ordinarily under the general rule, a case for an election would have arisen, but the husband was not required to elect solely because he was not entitled to the other half in his own right. In Wilkinson v. Dent, L. R. 6 Ch. 339, a testatrix owned an undivided half of an estate. She devised the estate as follows: "I give and devise all and singular the estate and mines of Aroa, in Columbia, formerly the estate of Simon Bolivar," etc., upon trusts. for the benefit, among others, of the parties who were entitled to some interest in the other half of the estate. James, L. J., said: "It appears to me utterly impossible to suppose that when she

(b) The text is cited and followed in Penn v. Guggenheimer, 76 Va. 839, 847. See, also, Ditch v. Sennott, 117 Ill. 362, 7 N. E. 640.

deducible from these recent decisions in England is, that when a person owns an undivided interest or share in any species of property,—a house and lot, a farm, a fund of securities, or a fund of money,—and he does not use general words of gift, such as "all my estate," "all my property," and the like, but purports to give the *whole thing itself,* using language which, by a reasonable interpretation, must necessarily describe and define the whole *corpus* of the thing in which his partial interest exists, as a distinct and identified piece of property, then an intention to bestow the whole, and not merely the testator's undivided share, must be inferred, and a case for an election arises. The language of description may be by metes and bounds, or may be any other form of words which will serve clearly to point out and identify the entire subject-matter.[3] [d]

§ 490. **The Donor Owns only a Future Interest.**— The rule thus established with reference to present undivided interests is not applied, at least with equal strictness, to

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said, 'I give and devise all,' etc., she meant only to give such estate and interest as she had in the property. A will must be construed reasonably, even where by so doing parties are put to their election."[c]

[3] As an illustration, if a testator owns an undivided half of a certain farm, and should devise the farm itself as a whole, either describing it by metes and bounds, or identifying it as a whole by any other form of words, an election would be necessary. The cases which have arisen in the United States presenting the closest analogy to these recent English decisions are those which are found in the California reports dealing with the "community property" of the husband and wife. It will be seen, in a subsequent paragraph, that the rule as stated in the text and established by the English courts has not been adopted by the California courts under circumstances closely analogous.[e]

(c) In Wooley v. Schrader, 116 Ill. 29, 4 N. E. 658, the testator had the legal title to a piece of land, and his son had the equitable title and a right to a conveyance. The testator devised the land to another by general description, and made other provisions for his son. In determining whether the entire estate, legal and equitable, was intended to be devised, the court held that a provision in the will directing that compensation be made to the son for improvements made by him was decisive in showing that the testator intended to dispose of the entire fee, and not his mere legal title, and that the son was put to an election.

(d) The text is quoted and followed in Penn v. Guggenheimer, 76 Va. 839, 847.

(e) See *post,* §§ 503–505.

cases where the donor has only a future interest, as a remainder or reversion in fee. If a testator, owning a remainder or reversion in fee, with no power over the precedent life estates, uses general language of disposal, such as "all my estate," or even disposes of the property as a whole by name, he is to be regarded as intending only to dispose of his future interest, and no necessity for an election arises.[1] This result, however, is not universal. Although a testator must be taken *prima facie* to have intended only to dispose of what belongs to him, there is no such rule as that where a testator has a limited interest in property forming the subject of a devise or bequest, the intention to make a disposition extending beyond that interest cannot be made clear by anything short of positive declaration. The context of the will, and the aptitude of the testamentary limitations to the testator's interest, ought to be regarded. If, from the context of the will and all the dispositions taken together, an intention on the part of the testator is clear to give the antecedent life estates as well as his own remainder or reversion in fee, then an election becomes necessary by those who, owning the life estates, have received other benefits from the will.[2] It has also been held that where a testator has a contingent interest only in certain property,— an interest which will only vest in him upon the happening of a contingent event,— and he bequeaths the property by language of gift general in its terms and absolute in its form, without referring to the contingent character of his interest, he must be assumed to have intended to dispose only of his own contingent interest, and not to make an absolute gift. If the contingency should not happen, and the bequest therefore failed, no election would be necessary by the person who succeeded to property and who also took a benefit under the will.[3]

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[1] Rancliffe v. Parkyns, 6 Dow, 149.

[2] Wintour v. Clifton, 8 De Gex, M. & G. 641, 649, 650; 21 Beav. 447. The testator had several different estates. Some of them he owned absolutely; but in one of them he owned only the fee in remainder, the life estates being held by others. His will made very complicated dispositions, which applied alike to all the estates. From the whole scheme of the will the court held the intent was clear to dispose of the antecedent life interest in the last-mentioned estate, as well as the remainder in fee, and an election was necessary. For an extract from the opinion, see *ante*, § 474, note. See also Smith v. Smith, 14 Gray, 532; Hyde v. Baldwin, 17 Pick. 308; Smith v. Guild, 34 Me. 443; Hamblett v. Hamblett, 6 N. H. 333; Fulton v. Moore, 25 Pa. St. 468; Weeks v. Patten, 18 Me. 42, 36 Am. Dec. 696.

§ 491. **Devise of Lands Encumbered, where the Encumbrancers also Receive Benefits under the Will.**—Where a testator owns property which is subject to some encumbrance or charge, and he devises it, distinctly describing it, but not making any provision with respect to the encumbrance, and at the same time he gives some other bequest to the encumbrancer or holder of the charge, no case for an election by the latter is thereby raised. The testator is regarded as having intended to devise only the property subject to the charge or encumbrance.[1] The same rule has been applied to general creditors, where a will contains a devise or bequest of property in trust for the payment of the testator's debts.[2]

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[3] Havens v. Sackett, 15 N. Y. 365. The testator was entitled to certain bank stocks, provided he should survive his brother's widow, but in case he died before the widow the stocks should belong to the children. He bequeathed the stocks to the plaintiff as follows: "The stocks given to me by my said brother after the decease of his widow." The testator dying before his widow, the stocks passed to his children; and they were held not bound to elect between these stocks and the benefits given by their father's will. See extract from the opinion, *ante*, § 488, note.

[1] Stephens v. Stephens, 1 De Gex & J. 62; 3 Drew. 697. The question in this case was whether the defendants, brothers and sisters of the plaintiff, were not bound to elect between the benefits given to them by the will of their father, John S., and the benefit of a charge for ten thousand pounds, created in their favor by the will of their grandfather, William S., upon an estate which the plaintiff, the elder brother, took under that will, but which the father, John S., had also purported to devise to him by his will. The court of appeal, Lord Chancellor Cranworth, and Lords Justices Knight Bruce and Turner, held that under the settled rule applicable under such circumstances, the defendants were not bound to elect. Lord Cranworth said (p. 71): "Where a testator simply gives an estate, without saying more, he is to be taken to mean the estate in its present condition, subject to the existing charges upon it. Lord Chief Baron Eyre, in Blake v. Bunbury, 1 Ves. 514, says: 'If there is an encumbrance upon the estate devised in such terms' (i. e., in general terms applicable to an estate of which the testator is absolute owner), 'the mere language of the will affords no inference of an intention to dispose of the estate free from that encumbrance.'" An intention to devise free from the encumbrance, so as to put the encumbrancer also receiving a benefit to his election, must appear conclusively from the words of the will: Sadlier v. Butler, 1 I. R. Eq. 415, 423.

§ 492. **Dower — Election by a Widow between her Dower and Benefits Given by her Husband's Will.**— Where a husband devises or bequeaths property to his wife, the question arises, whether she must elect between this benefit and her dower, or whether she is entitled to claim both her dower and the testamentary gift. This is by far the most important and frequent aspect in which the doctrine of election has come before the American courts,— so important that election itself has sometimes been treated by American writers as a mere incident of dower. In considering this branch of the subject, I purpose, in the first place, to state the general rule for the interpretation of such wills as settled by judicial authority, and then to explain the most important kinds of particular testamentary dispositions which have given rise to more special and definite rules.

§ 493. **The General Rule.**— In England and in the states where the common-law dower, or an interest of the wife analogous thereto, exists, the following general rule for the interpretation of a husband's will, and for the determination of his widow's obligation to elect, has been established by the overwhelming weight of authority. If the will declares in express words that the testamentary gift is intended to be in lieu of dower, the widow is obliged, even at law, to elect.[1] When, however, the will contains no such express words, every devise or bequest made to the wife is presumed to be intended as a provision in addition to her dower right, and in general, she will not be required to elect. The duty of electing may arise even in the absence of any express declaration that the testamentary gift is in lieu of dower, but can only arise from a clear, unequivocal intention exhibited in provisions of the will incompatible with the right of dower. "If there is anything ambiguous or doubtful, if the court cannot say that it was clearly the intention to exclude, then the averment that the gift was made in lieu of dower cannot be supported; and to make a case of election, that is necessary, for a gift is to be taken as pure until a condition appear. The only question made in all the cases is, whether an intention, not expressed in apt words, can be collected from the terms of the instrument. The result of all the cases of implied intention seems to be, that the instrument must contain some provision inconsistent with the assertion of a right to demand a third of the lands, to be set out by metes and bounds."[2] "The inquiry is, whether an intention in the testator that the testamentary gift is to be in lieu of dower can be collected by clear and manifest implication from the provisions of the will. To enable us to deduce such an implied intention, the claim of dower must be inconsistent with the will, and repugnant to its dispositions, or some of them. It must, in fact, disturb or disappoint the will."[3] "A wife cannot be deprived of her dower by a testamentary disposition in her favor, unless the testator has declared the same to be in lieu of dower, either in express words, or by necessary implication. To compel a widow to elect between the dower and a testamentary provision, where the testator has not in terms declared his intention on the subject, it is not sufficient *that the will renders it doubtful* whether he intended that she should have her dower in addition to the provision; but the terms and provisions of the will must be totally incon-

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[2] Thus where the will contains such a devise, it has been held that creditors need not elect between the benefit of such provision, and the enforcement of their legal rights against other funds or assets of the estate disposed of by the will: Kidney v. Cousmaker, 12 Ves. 136, 154, per Sir William Grant; Clark v. Guise, 2 Ves. Sr. 617; Deg v. Deg, 2 P. Wms. 412, 418. The doctrine of these cases, viz., that the necessity of election does not extend to creditors, has been rejected by certain decisions of the Pennsylvania supreme court, which seem to require an election by the creditors under such circumstances. See Irwin v. Tabb, 17 Serg. & R. 419, 423; Adlum v. Yard, 1 Rawle, 163, 171; 18 Am. Dec. 608.

[1] Nottley v. Palmer, 2 Drew. 93; Boynton v. Boynton, 1 Brown Ch. 445.

[2] Birmingham v. Kirwan, 2 Schoales & L. 444, 452, per Lord Redesdale.

[3] Adsit v. Adsit, 2 Johns. Ch. 448; 7 Am. Dec. 539, per Chancellor Kent.

sistent with her claim of dower in the property in which such dower is claimed."[4] It results that whatever be the dispositions of the will to the widow and to others, the presumption is strong in favor of the intention that the widow shall have both the gift and her dower; the courts lean heavily in support of this presumption; nothing short of a perfect incongruity between the dispositions of the will and the widow's claim to set out her dower *by metes and bounds* from her husband's lands can put her to an election. However positive and absolute the testator's language of donation, the court will, if possible, read it as meaning, "I devise and bequeath all my interest in the land subject to my wife's dower right."[5] It must also be carefully observed, as a conclusion drawn from all the cases of authority, that it is not sufficient to raise a case for an election, that an intention can even be plainly inferred from the dispositions of the will for the widow to take the testament gift in lieu of her dower; in order to put her to an elec-

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[4] Church v. Bull, 2 Denio, 430; 43 Am. Dec. 754, per Chancellor Walworth.

[5] Dowson v. Bell, 1 Keen, 761; Harrison v. Harrison, 1 Keen, 765; Holdich v. Holdich, 2 Younge & C. 18, 23; Parker v. Sowerby, 4 De Gex, M. & G. 321, and cases cited; Thompson v. Burra, L. R. 16 Eq. 592; Roberts v. Smith, 1 Sim. & St. 513; Roadley v. Dixon, 3 Russ. 192, 200, 201; Villa Real v. Lord Galway, 1 Brown Ch. 292, note; Amb. 682; Pitts v. Snowden, 1 Brown Ch. 292, note; Foster v. Cooke, 3 Brown Ch. 347; Pearson v. Pearson, 1 Brown Ch. 292; French v. Davies, 2 Ves. 572; Greatorex v. Cary, 6 Ves. 615; Birmingham v. Kirwan, 2 Schoales & L. 444; Lord Dorchester v. Earl of Effingham, Coop. 419; Dickson v. Robinson, 1 Jacob, 503; Taylor v. Taylor, 1 Younge & C. 727; Pepper v. Dixon, 17 Sim. 200; Lowes v. Lowes, 5 Hare, 501; Reynolds v. Torin, 1 Russ. 129, 133. In Dowson v. Bell, 1 Keen, 761, Lord Langdale, M. R., said (p. 764): "That the testator had himself no intention to leave his wife her claim for dower, when he made this will, cannot be reasonably doubted, but the question is, whether the devise is of such a nature *as to be inconsistent with the enjoyment of her dower* by the widow. In the consideration of this question, when the testator speaks of all his estates, he must be held to mean all his estates subject to the legal rights against them, and among these is the wife's right to dower." In Harrison v. Harrison, 1 Keen, 765, the same able judge said (p. 767): "The principle applicable to cases of this kind is, that where a testator makes a provision for his widow out of his real estates, she will not be excluded from dower, unless the enjoyment of dower, together with the provision made by the will, appears to be inconsistent with the intention of the testator as it is to be collected from the language of the will." In Holdich v. Holdich, 2 Younge & C. 18, 23, Knight Bruce, V. C., said: "To put the wife to her election on the ground that her claim to dower is inconsistent with the intention of the testator as to some other legatee or devisee, *there must be something beyond the mere gift to the legatee or devisee.* There must be such circumstances attending the gift as that, if dower be admitted, the legatee or devisee

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will be disappointed of the enjoyment of the property in the mode pointed out by the testator." In Roadley v. Dixon, 3 Russ. 192, 200, Lord Lyndhurst said: "The law upon questions of this kind is very distinctly and clearly settled. The widow will be entitled to her dower, unless in the will under which she takes a benefit there are provisions *absolutely inconsistent with her claim of dower.*" In Reynolds v. Torin, 1 Russ. 129, 133, Lord Gifford, M. R., said: "To exclude the widow from her legal right, either there must be an express declaration to that effect, or it must appear clearly from the whole frame of the will that it was the testator's intention to give her some interest wholly inconsistent with her enjoyment of that legal right." The remaining cases cited above will show what dispositions of a will the English courts, in applying this rule, have regarded as sufficiently inconsistent with her claim of dower, in order to put a widow to an election. The general rule thus established in England is fully adopted by the decisions in all the states where the common-law dower, or a legal right analogous thereto, still exists not essentially altered by statute. Adsit v. Adsit, 2 Johns. Ch. 448; 7 Am. Dec. 539; Smith v. Kinskern, 4 Johns. Ch. 9; Swaine v. Perine, 5 Johns. Ch. 482; 9 Am. Dec. 318; Larrabee v. Van Alstyne, 1 Johns. 307; 3 Am. Dec. 333; Van Orden v. Van Orden, 10 Johns. 30; 6 Am. Dec. 314; Jackson v. Churchill, 7 Cow. 287; 17 Am. Dec. 514; Wood v. Wood, 5 Paige, 597, 601; 28 Am. Dec. 451; Fuller v. Yates, 8 Paige, 325; Sandford v. Jackson, 10 Paige, 266; Havens v. Havens, 1 Sand. Ch. 325, 330; Bull v. Church, 5 Hill, 206; 2 Denio, 430; 43 Am. Dec. 754; Sheldon v. Bliss, 8 N. Y. 31; Lewis v. Smith, 9 N. Y. 502; 61 Am. Dec. 706; Savage v. Burnham, 17 N. Y. 561, 577; Tobias v. Ketchum, 32 N. Y. 319, 326; Vernon v. Vernon, 53 N. Y. 351, 362; Lefevre v. Lefevre, 59 N. Y. 435; Leonard v. Steele, 4 Barb. 20; Lasher v. Lasher, 13 Barb. 106; Mills v. Mills, 28 Barb. 454; Vedder v. Saxton, 46 Barb. 188; Evans v. Webb, 1 Yeates, 424; 1 Am. Dec. 308; Hamilton v. Buckwalter, 2 Yeates, 389; 1 Am. Dec. 350; Duncan v. Duncan, 2 Yeates, 302; Webb v. Evans, 1 Binn. 565, 572; Cauffman v. Cauffman, 17 Serg. & R. 16, 25; Preston v. Jones, 9 Pa. St. 456, 460; Fulton v. Moore, 25 Pa. St. 468; Cox v. Rogers, 77 Pa. St. 160; Stark v. Hunton, 1 N. J. Eq. 217, 224; Van Arsdale v. Van Arsdale, 26 N. J. L. 404, 417; Colgate v. Colgate, 23 N. J. Eq. 372; Perkins v. Little, 1 Greenl. 148; O'Brien v. Elliot, 15 Me. 125; 32 Am. Dec. 137; Weeks v. Patten, 18 Me. 42; 36 Am. Dec. 696; Smith v. Guild, 34 Me. 443; Brown v. Brown, 55 N. H. 106; Hamblett v. Hamblett, 6 N. H. 333; Reed v. Dickerman, 12 Pick. 145, 149; Hyde v. Baldwin, 17 Pick. 303, 308; Kempston's Appeal, 23 Pick. 163; Smith v. Smith, 14 Gray, 532; Lord v. Lord, 23 Conn. 327, 331; Alling v. Chatfield, 42 Conn. 276; Chapin v. Hill, 1 R. I. 446; Hall's Case, 1 Bland, 203; 17 Am. Dec. 275; Collins v. Carman, 5 Md. 503; Wiseley v. Findlay, 3 Rand.

tion, such an intention on the part of the testator must be expressed by means of testamentary dispositions and provisions which are wholly and unmistakably inconsistent with the assertion of her claim to the dower. *Mere* intention of the testator gathered from the will is clearly

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361; 15 Am. Dec. 712; Ambler v. Norton, 4 Hen. & M. 23, 44; Higginbotham v. Cornwell, 8 Gratt. 83; 56 Am. Dec. 130; Dixon v. McCue, 14 Gratt. 540; Pickett v. Peay, 3 Brev. 545; 6 Am. Dec. 594; Gordon v. Stevens, 2 Hill Ch. 46; 27 Am. Dec. 445; Brown v. Caldwell, 1 Speers Eq. 322; Snelgrove v. Snelgrove, 4 Desaus. Eq. 274, 294; Tooke v. Hardeman, 7 Ga. 20; Worthen v. Pearson, 33 Ga. 385; 81 Am. Dec. 213; Adams v. Adams, 39 Ala. 274; Apperson v. Bolton, 29 Ark. 418; Carroll v. Carroll, 20 Tex. 731, 744; Shaw v. Shaw, 2 Dana, 342; Timberlake v. Parish's Ex'r, 5 Dana, 346; Bailey v. Duncan, 4 Mon. 256, 265, 266; Douglas v. Feay, 1 W. Va. 26; Pemberton v. Pemberton, 29 Mo. 408, 413; Clark v. Griffith, 4 Iowa, 405; Mitteer v. Wiley, 34 Iowa, 214; Herbert v. Wren, 7 Cranch, 370, 378.[a] In the early case of Herbert v. Wren, 7 Cranch, 370, 378, Marshall, C. J., thus stated the rule: "It is a maxim of a court of equity not to permit the same person to hold under and against a will. If, therefore, it be manifest from the face of the will that the testator did not intend the provision it contains for his widow to be in addition to dower, but to be in lieu of it, if his intention, discovered in other parts of the will, must be defeated by the allotment of dower to the widow, she must renounce either her dower or the benefit of the claims under the will. But if the two provisions may stand well together, if it may fairly be presumed that the testator intended the devise or bequest to his wife as additional to her dower, then she may hold both." The language of Marshall, C. J., in this last clause of the extract is open to criticism, as not expressing correctly the intention which must appear, in order that the widow may hold both her dower and the testamentary gift. The general rule was stated perhaps more accurately by Denio, J., in Lewis v. Smith, 9 N. Y. 502; 61 Am. Dec. 706, as follows:

(a) See, also, Bennett v. Packer, 70 Conn. 357, 66 Am. St. Rep. 112, 39 Atl. 739; Thompson v. Betts, 74 Conn. 576, 51 Atl. 564, 92 Am. St. Rep. 235; Potter v. Workey, 57 Iowa, 66, 7 N. W. 685, 10 N. W. 298; Blair v. Wilson, 57 Iowa, 178, 10 N. W. 327; Snyder v. Miller, 67 Iowa, 261, 25 N. W. 240; Daugherty v. Daugherty, 69 Iowa, 679, 29 N. W. 778; Estate of Blaney, 73 Iowa, 114, 34 N. W. 768; Howard v. Watson, 76 Iowa, 229, 41 N. W. 45; Kiefer v. Gillett, 120 Iowa, 107, 94 N. W. 270; Hunter v. Hunter, 95 Iowa, 728, 58 Am. St. Rep. 455, 64 N. W. 656; Campbell v. Sankey, 114 Iowa, 69, 86 N. W. 48; Matter of Zahrt, 94 N. Y. 605; Asch v. Asch, 113 N. Y. 232, 21 N. E. 70; In re Gorden, 172 N. Y. 25, 92 Am. St. Rep. 689, 64 N. E. 753; Durfee's Petition, 14 R. I. 47; Haszard v. Haszard, 19 R. I. 374, 34 Atl. 150; Bannister v. Bannister, 37 S. C. 529, 16 S. E. 612; Garrett v. Vaughan, 59 S. C. 516, 38 S. E. 166; Rutherford v. Mayo, 76 Va. 117; Nelson v. Kowndar, 79 Va. 468; Tracey v. Shumate, 22 W. Va. 474, 499; Atkinson v. Sutton, 23 W. Va. 197.

not enough; that intention must have been shown, or carried into operation, by totally inconsistent gifts of the land subject to the dower.[c]

§ 494. A Different Statutory Rule in Certain States.—As will more particularly appear in a subsequent paragraph, the time and mode of electing between her dower and a will, by a widow, is very precisely regulated in many of the states by statute. Either as a result of this legislation, or of statutes changing the nature of dower, a general rule concerning the necessity of election by widows, quite different from that set forth in the foregoing paragraph, has been adopted in some of the states. By this rule, wherever a testamentary disposition in behalf of his widow is contained in the husband's will, and his intention that she is to enjoy both this gift and her dower does not affirmatively and expressly appear on the face of the instrument, she is required to elect between the two.[1]

"The courts do not inquire whether the testamentary provision is adequate, or reasonably proportionate to the value of the dower. . . . . Where there is no direct expression of intention that the provision shall be in lieu of dower, the question always is, whether the will contains any provision inconsistent with the assertion of a right to demand a third of the lands, to be set out by metes and bounds. *The devises in the will must be so repugnant to the claim of dower that they cannot stand together.*"[b]

[1] In several of these states the common-law dower has been abolished, and a statutory right to a portion of her husband's real estate has been given to the widow in place of the dower. In many of the states mentioned in this note it will be seen that the new statutory rule concerning the effect of a testamentary provision in favor of the widow, and the consequent necessity for her to elect, extend not only to her dower, or to the portion of real estate given in place of dower, but also to her distributive share of her husband's personal estate. Wherever an election by the widow is required under the statutes, she is generally obliged to make it in a formal manner, by means of a written instrument, which is either filed with the clerk of the court, or entered in the records of the pending proceedings. I arrange the states in classes, the statutory provision of all those which

(b) In determining whether a testamentary disposition was intended in place of dower, the fact of the inadequacy of the provision, which was known to the testator, is considered a strong indication that such was not the intention: Tracey v Shumate, 22 W. Va. 474; Atkinson v. Sutton, 23 W. Va. 197.

(c) The text is quoted in Stokes v. Pillow, 64 Ark. 1, 40 S. W. 580 (election between devise and homestead estate).

§ 495. **Classes of Testamentary Dispositions.**— So many cases have arisen upon wills containing dispositions by the testator, similar in their operation, that the English and American courts have been enabled to make a classification

constitute a class being substantially the same in language, and actually the same in legal effect.

First Class.— In the states of this class any testamentary provision made by the husband's will in favor of his wife, whether devise of land, or bequest of personal property, is deemed to be in lieu of her dower or statutory portion given in place of dower, and in many states of her share of the personal property, and bars her right to her dower, statutory portion, or share, unless it plainly appears on the face of the will that her husband intended she should have both, or unless she duly elect to waive the testamentary benefit. Where the will does not expressly show that she was to have both, she must, within a certain prescribed time, elect against the will, and must, in a formal manner, waive or reject the testamentary provision, or else she will be deemed to have elected in favor of it, and will be barred of her dower, or statutory portion in place of dower, and in many states of her distributive share. In several of the states this formal renunciation of the will must be made within six months after probate; in some within a year. I have indicated the period in connection with each state. The following states belong to this class:—

Alabama.— Rev. Code, secs. 1928, 1929: Extends to dower and distributive share; must elect within one year from probate. See Hilliard v. Benford's Heirs, 10 Ala. 977, 990; McGrath v. McGrath, 38 Ala. 246.[a]

Illinois.— Hurd's Rev. Stats. 1880, p. 426, secs. 10, 11:[b] Extends to dower; election must be within one year after letters testamentary are issued. See Haynie v. Dickens, 68 Ill. 267; Sutherland v. Sutherland, 69 Ill. 481; Padfield v. Padfield, 78 Ill. 16; Gauch v. St. Louis, etc., Ins. Co., 88 Ill. 255; 30 Am. Rep. 554; Mowbry v. Mowbry, 64 Ill. 383; Brown v. Pitney, 39 Ill. 468; Jennings v. Smith, 29 Ill. 116.

[c]

Kansas.— Comp. Laws 1879, p. 1005, sec. 6153:[d] Extends to widow's statutory portion; election must be made within thirty days after service of a citation issued to her after the probate. See Allan v. Hannum, 15 Kan. 625.

[e]

(a) *Alabama.*— See also Crenshaw v. Carpenter, 69 Ala. 572, 44 Am. Rep. 539; Sanders v. Wallace, 118 Ala. 418, 24 South. 354.

(b) *Illinois.*— Rev. Stats. 1889, 1893, chap. 41, §§ 10, 11; Warren v. Warren, 148 Ill. 61, 22 L. R. A. 393, 36 N. E. 611 (inadequacy of provision immaterial).

(c) *Indiana.*— Burns' Rev. Stats. 1901, §§ 2648, 2666. See Miller v. Stephens, 158 Ind. 438, 63 N. E. 847, for the terms and construction of these statutes.

(d) *Kansas.*— Comp. Laws 1885, c. 117, sec. 41.

(e) *Kentucky.*— Ky. Stats., §§ 1404, 2136. For the terms and construction of these statutes see Bayes v. Howes, 24 Ky. L. Rep. 281, 68 S. W. 449.

of wills, and to establish a number of special rules declaring what particular kind of testamentary disposition is and what is not inconsistent with a claim of dower, so that the widow shall or shall not be put to an election thereby.

Maine.— Rev. Stats. 1871, p. 757, c. 103, sec. 10: Extends to dower; election must be within six months after the probate. See Allen v. Pray, 12 Me. 138, 142; Hastings v. Clifford, 32 Me. 132; Dow v. Dow, 36 Me. 211.

Massachusetts.— Rev. Stats., c. 60, sec. 11; Gen. Stats., c. 92, sec. 24; Stats. 1854, c. 428; Stats. 1861, c. 164:[f] Extends to dower; election must be made within six months after probate. See Atherton v. Corliss, 101 Mass. 40, 44; Reed v. Dickerman, 12 Pick. 146; Pratt v. Felton, 4 Cush. 174; Delay v. Vinal, 1 Met. 57; Adams v. Adams, 5 Met. 277.

Maryland.— Rev. Code 1878, p. 475, secs. 227–230:[g] Extends to dower and to distributive share; election must be made within six months after letters testamentary are issued. See Knighton v. Young, 22 Md. 359; Hilleary v. Hilleary's Lessee, 26 Md. 274; Gough v. Manning, 26 Md. 347, 366; Lynn v. Gephart, 27 Md. 547; Hinckley v. House of Refuge, 40 Md. 461; Pindell v. Pindell, 40 Md. 537.

Michigan.— 2 Comp. Laws 1871, p. 1362, secs. 4286, 4287:[h] Extends to dower; widow is deemed to have elected in favor of the will, unless within one year after her husband's death she begin proceedings to recover her dower.

Minnesota.— 1 Bissell's Stats. at Large, p. 628, secs. 152, 153:[i] Provisions same as in Michigan; but in 1875 dower was abolished, and these provisions repealed.

Mississippi.— Rev. Code 1871, p. 254, secs. 1286, 1287:[j] Extends to dower and to widow's share of personal estate; election must be made within six months after probate.

(f) *Massachusetts.*— Pub. Stats., c. 127, sec. 20. See, also, Matthews v. Matthews, 141 Mass. 511, 6 N. E. 776. The provision that the widow shall not be entitled to dower in addition to the provisions of her husband's will is held not to apply to lands of a resident of Massachusetts situated in a foreign state: Staigg v. Atkinson, 144 Mass. 567, 12 N. E. 354.

(g) *Maryland.*—Code 1888, art. 93, secs. 291–294.

(h) *Michigan.*— Howell's Stats. 1882, secs. 5750, 5751; Comp. Laws, § 9064; Stearns v. Perrin, 130 Mich. 456, 90 N. W. 297.

(i) *Minnesota.*— Rev. Stats. 1851, c. 49, sec. 18; Gen. Stats. 1866, c. 48, sec. 18. By the Laws of 1875, c. 40, abolishing dower, an estate of inheritance in lieu of dower is given to the widow, and the rules governing election between this statutory estate and provisions made for the widow by the will of her husband are the same as the general rules of equity governing election in cases of dower. Unless the contrary appears from the will, the presumption is, that a legacy is intended as a bounty, and not as a satisfaction of the statutory interest of the wife: Estate of Gotzian, 34 Minn. 159, 57 Am. Rep. 43, 24 N. W. 920.

(j) *Mississippi.*— Code 1880, secs. 1172, 1174.

The most common and important of these testamentary forms, and of the special rules concerning them, will now be stated.

§ 496. **Express Declaration.**— If the testator, in express terms, declares that any gift which he makes to his widow,

Nebraska.— Gen. Stats. 1873, p. 278, secs. 17, 18: Extends to dower; election is deemed to be made in favor of the will, unless within one year after her husband's death the widow begins proceedings to recover her dower.[k]

North Carolina.— Battle's Rev. 1873, p. 840, sec. 6:[l] Extends to dower; election must be made within six months after probate. See Craven v. Craven, 2 Dev. Eq. 338; Bray v. Lamb, 2 Dev. Eq. 372; 25 Am. Dec. 718.

Ohio.— 2 Rev. Stats. 1879, p. 1433, sec. 5963: Extends to dower; election must be made within one year after service of a citation upon the widow for that purpose. See Stilley v. Folger, 14 Ohio, 610, 646; Luigart v. Ripley, 19 Ohio St. 24; Baxter v. Boyer, 19 Ohio St. 490; Bowen v. Bowen, 34 Ohio St. 164; Thompson v. Hoop, 6 Ohio St. 480; Stockton v. Wooley, 20 Ohio St. 184; Davis v. Davis, 11 Ohio St. 386; Jennings v. Jennings, 21 Ohio St. 56.

Oregon.— Gen. Laws 1872, p. 586, §§ 18, 19:[m] Extends to dower; widow is deemed to have elected in favor of the will, unless within one year after the death of her husband she begins proceedings to recover her dower.

Pennsylvania.— Brightly's Purdon's Dig., p. 362, secs. 4-6:[n] Extends to dower; after one year from the husband's death a citation may be issued to the widow, and she must then elect. See Anderson's Appeal, 36 Pa. St. 476; Melizet's Appeal, 17 Pa. St. 449; 55 Am. Dec. 573; Cauffman v. Cauffman, 17 Serg. & R. 16; Heron v. Hoffner, 3 Rawle, 393; Reed v. Reed, 9 Watts, 263; Leinaweaver v. Stoever, 1 Watts & S. 160; Borland v. Nichols, 12 Pa. St. 38; 51 Am. Dec. 576.

Tennessee.— Code 1871, vol. 2, p. 1077, sec. 2404. Extends to dower; election must be made within one year after probate. See Reid v. Campbell, Meigs, 378, 388; Malone v. Majors, 8 Humph. 577, 579; McClung v. Sneed, 3 Head, 218, 223; Waddle v. Terry, 4 Cold. 51, 54; Demoss v. Demoss, 7 Cold. 256, 258.

Wisconsin.— 2 Taylor's Stats. 1871, p. 1160, secs. 18, 19:[o] Extends to dower; widow is deemed to have elected in favor of the will, unless within one year after probate she begins proceedings to recover her dower.

(k) *Nebraska.*— Dower Abolished, 1889.

(l) *North Carolina.*— Code 1883, sec. 2108.

(m) *Oregon.*— Hill's Laws 1887, secs. 2971, 2972.

(n) *Pennsylvania.*— Brightly's Purdon's Dig., ed. of 1883, p. 632.

(o) *Wisconsin.*— Laws of 1877, c. 106; Sanborn and Berryman's Stats. 1889, sec. 2172. Under the laws of 1877 (c. 106), if a will makes provision for the widow, she is excluded from any share in either the real or personal estate of the testator left undisposed of by the will, by virtue of the right of dower or under the statute of distributions, unless she duly renounces the provision so made for her in the will: Hardy v. Scales, 54 Wis. 452, 11 N. W. 590. In Wilber v. Wilber, 52 Wis. 298, 9 N. W. 163, it is held that the statutory right of election cannot be taken whether legacy or devise, shall be in lieu of her dower, she is, of course, required to elect between the will and her dower right, both at law and in equity; and the value of the gift in proportion to that of her dower, whether large

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Second Class.— In all the states of this class, any devise of land by the husband to his widow is deemed to be in lieu of dower, and puts her to an election, unless the will expressly shows his intention that she shall receive both. A bequest of personal property is not so deemed, and does not put the widow to an election, unless it is expressly given in lieu of her dower, or unless the testator's intention that it shall be instead of dower is plainly manifested from the provisions of the will. When thus required to elect, the widow's election must be made in a formal manner, by a writing, and within certain prescribed times. The prescribed periods of time within which the election must be made are mentioned in connection with each state of the class. The following states compose this class:—

Arkansas.— Gantt's Dig., secs. 2233, 2235, 2236:[p] Where a devise is simply given to the widow, she must elect against the will within eighteen months after her husband's death, or else she is regarded as having elected in favor of the will. Also, in Gantt's Dig., sec. 2223,[q] when any provision is given to her *expressly* in lieu of her dower, she must elect against the will within one year after her husband's death, by commencing proceedings to recover her dower.

Delaware.— Rev. Code 1852–74, p. 534, secs. 5, 6, 7: Widow must elect against the will within thirty days after service of a citation on her. See Chandler v. Woodward, 3 Harr. (Del.) 428.

Georgia.— Code 1873, p. 305, secs. 1764, 1765: Widow must elect when land is devised to her, but the time of making the election and its mode are not prescribed. See Tooke v. Hardeman, 7 Ga. 20; Raines v. Corbin, 24 Ga. 185; Worthen v. Pearson, 33 Ga. 385; 81 Am. Dec. 213; Clayton v. Akin, 38 Ga. 320; 95 Am. Dec. 393; Gibbon v. Gibbon, 40 Ga. 562.[r]

Missouri.— 1 Wagner's Stats. 1870, p. 541, secs. 15, 16: Widow must elect in writing within one year after probate to waive the devise, or she is deemed

from the widow either by the will, or by a deed of release executed by her to her husband during coverture. See, also, Leach v. Leach, 65 Wis. 291, 26 N. W. 754; Melms v. Pabst Brewing Co., 93 Wis. 140, 66 N. W. 244; Villey v. Lewis, 113 Wis. 618, 88 N. W. 1021.

(p) *Arkansas.*—Dig. of Stats. 1884, secs. 2594, 2596, 2597.

(q) Dig. of Stats. 1884, sec. 2284.

(r) *Georgia.*— In Forester v. Watford, 67 Ga. 508, and Aldridge v. Aldridge, 79 Ga. 71, 3 S. E. 619, it was held that before the right to dower can be defeated, the widow must do some act showing her acceptance of the provision of the will. As to what will amount to such an election, see Churchill v. Bee, 66 Ga. 621; Johnston v. Duncan, 67 Ga. 61. The wife cannot be put to her election until after the death of her husband. Consequently, a deed from the husband to his wife, accepted by her at the time, in lieu of dower, will not have that effect, unless ratified after the husband's death: Butts v. Trice, 69 Ga. 74.

or small, is entirely immaterial.[1] [a] In all the subsequent classes the will contains no such express declaration.

§ 497. **Devise of a Part to the Widow and of the Rest to Others.**— Where a testator simply devises to his widow a part of the lands which are subject to dower, with or without any additional pecuniary provision by way of legacy, and gives the rest of his real estate to others to be enjoyed by such devisees for their own benefit,— that is, not to trustees upon trust to sell such residue,— it is well settled, both in England and in this country, that the disposition made by the testator is not inconsistent with his widow's claim for dower, and no necessity for an election is created.[1] Where the devise to a third person, after

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to have elected in favor of the will. See Pemberton v. Pemberton, 29 Mo. 408; Brant v. Brant, 40 Mo. 266.

New Jersey.— Rev. Stats. 1877, p. 322, sec. 16: Any devise is a bar of dower, unless the widow elects to waive it within six months after probate. See Stark v. Hunton, 1 N. J. Eq. 216; Norris v. Clark, 10 N. J. Eq. 51; Adamson v. Ayres, 5 N. J. Eq. 349; Colgate v. Colgate, 23 N. J. Eq. 372; Morgan v. Titus, 3 N. J. Eq. 201; English v. English, 3 N. J. Eq. 504; 29 Am. Dec. 730; White v. White, 16 N. J. L. 202; 31 Am. Dec. 232; Thompson v. Egbert, 17 N. J. L. 459; Van Arsdale v. Van Arsdale, 26 N. J. L. 404.■

§ 496, [1] See many of the cases cited in the preceding notes, under § 493.

§ 497, [1] Lawrence v. Lawrence, 2 Vern. 365; 2 Freem. 234, 235; 3 Brown Parl. C., Tomlins's ed., 483; Lemon v. Lemon, 8 Vin. Abr., p. 366, pl. 45; French v. Davies, 2 Ves. 572; Strahan v. Sutton, 3 Ves. 249; Lord Dorchester v. Earl of Effingham, Coop. 319; Brown v. Parry, 2 Dick. 685; Incledon v. Northcote, 3 Atk. 430, 436; Gibson v. Gibson, 1 Drew. 42; Lawrence v. Lawrence, 2 Vern. 365, 2 Freem. 234, 235, 3 Brown Parl. C., Tomlins's ed., 483, is the leading case. The testator devised part of his real estate to his wife during her

(■) *New Jersey.*— See also Stewart v. Stewart, 31 N. J. Eq. 398; Cooper v. Cooper, 56 N. J. Eq. 48, 38 Atl. 198; Hill v. Hill, 62 N. J. L. 442, 41 Atl. 943. In Griggs v. Veghte, 47 N. J. Eq. 179, it is held that an intention to make an equal division of the testator's estate, not otherwise disposed of, between the wife and other beneficiaries is inconsistent with her taking dower.

(a) Where the provision of the will expressly states that it shall be accepted and received in lieu of dower, and of all claims the widow may have against the testator's estate as his widow, it is held that the declaration was not simply for the benefit of the other devisees and legatees, but was in ease of the entire estate, and barred the widow from any other share thereof, and consequently she was not entitled to share under the statute of distributions in a lapsed legacy: In re Bullard, 96 N. Y. 499, 48 Am. Rep. 646, disapproving Pickering v. Stanford, 2 Ves. 272, 581, 3 Ves. 332, 492.

a provision made for the widow, is specific of a certain tract of land specifically defined and identified, a variation from this rule has been suggested and even adopted in some American cases. Under ordinary circumstances the specific nature of the devise does not prevent the operation of the rule; but when the specific devise is for the benefit of one whom the testator is bound to support, the rule *may* not apply.[2]

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widowhood, and also gave her several legacies, both specific and general. The residue of his real estate was devised to trustees, in trust, for specified persons. Lord Somers held that the widow was bound to elect, but his decision was reversed by Lord Keeper Wright, and that decree was confirmed by Lord Chancellor Cowper and the house of lords, and it was settled that she could claim both her dower and the benefits given by the will. The American decisions are equally unanimous and strong: Lefevre v. Lefevre, 59 N. Y. 435; Leonard v. Steele, 4 Barb. 20; Bull v. Church, 5 Hill, 207; 2 Denio, 430; 43 Am. Dec. 754; Lewis v. Smith, 9 N. Y. 502; 61 Am. Dec. 706; Mills v. Mills, 28 Barb. 454; Jackson v. Churchill, 7 Cow. 287; 17 Am. Dec. 514; Havens v. Havens, 1 Sand. Ch. 325, 329; Evans v. Webb, 1 Yeates, 424; 1 Am. Dec. 308; Pickett v. Peay, 3 Brev. 545; 6 Am. Dec. 594; Wiseley v. Findlay, 3 Rand. 361; 15 Am. Dec. 712; Brown v. Coldwell, 1 Speers Eq. 322, 325; Brown v. Brown, 55 N. H. 106; but see, *per contra*, Alling v. Chatfield, 42 Conn. 276; Apperson v. Bolton, 29 Ark. 418. In Lefevre v. Lefevre, 59 N. Y. 435, the testator gave one third of his estate, real and personal, to his widow, one third to a charitable society, then certain legacies, and the residue to his widow, to be disposed of, as she saw fit, for charitable purposes. She was not put to an election. In Leonard v. Steele, 4 Barb. 20, a husband died intestate, leaving his widow and a son. The son, dying, devised to his mother part of the real estate which thus descended to him, and the rest to others. The widow was held entitled to dower in all the real estate of her husband, and also to the land devised to her in fee by her son. In Mills v. Mills, 28 Barb. 454, the testator directed that one third of his estate should be set apart and invested for the use of his widow during her life, and on her death should be divided among his children; the residue to be divided among his children. The widow was held entitled to her dower in addition to the testamentary gift. In Jackson v. Churchill, 7 Cow. 287, 17 Am. Dec. 514, the testator devised to his widow his dwelling-house and part of his garden, and gave her legacies. He devised his farm to his sons. The widow was held entitled to dower in the farm, as well as to the devise and legacy given by the will. These examples amply illustrate the rule as stated in the text.

[2] Under ordinary circumstances, a specific devise to a third person certainly makes no difference with the operation of the rule stated in the text, that no case for an election is raised: Strahan v. Sutton, 3 Ves. 249; Jackson v. Churchill, 7 Cow. 287, 17 Am. Dec. 514; Kennedy v. Nedrow, 1 Dall. 415, 418. But if the testator, after giving a portion of his property to his widow, makes a specific devise to a person whom he is bound to support or maintain,— as, for example, to his infant child who is otherwise unprovided for, and the devise

§ 498. **Devise to the Widow for Life.**—As a particular instance of the rule stated in the preceding paragraph, a devise to the widow of a certain portion of the real and personal estate, or either, for her life, and a devise of the rest of the lands to third persons, clearly does not raise a case for an election between the testamentary gift and dower *in the residue.*[1] A devise of a certain portion of the testator's lands, or of all his lands, to his widow for her life or during widowhood, presents *another* question: whether such a disposition is inconsistent with her claim of dower *in the lands thus devised to her for life,* or whether she can both accept the testamentary estate and also assert, if needful, her dower right therein. Upon this question there is a direct conflict among the American decisions. According to one class of cases, this form of gift is completely governed by the rule stated in the last preceding paragraph; no inconsistency exists, the widow is not obliged to elect, but may take the life interest given by the will, and also claim her dower in the same lands.[2] Another group

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is not more than enough for its support,—it has been said that such a disposition is inconsistent with the widow's claim of dower in the land so specifically bestowed. See Herbert v. Wren, 7 Cranch, 370, 378, per Marshall, C. J.; Alling v. Chatfield, 42 Conn. 276.

[1] Bull v. Church, 5 Hill, 207; 2 Denio, 430; 43 Am. Dec. 754; Lewis v. Smith, 9 N. Y. 502; 61 Am. Dec. 706; Mills v. Mills, 28 Barb. 454; Sandford v. Jackson, 10 Paige, 266; Jackson v. Churchill, 7 Cow. 287; 17 Am. Dec. 514; Havens v. Havens, 1 Sand. Ch. 325.

[2] Bull v. Church, 5 Hill, 207; 2 Denio, 430; 43 Am. Dec. 754; Sandford v. Jackson, 10 Paige, 266; Lewis v. Smith, 9 N. Y. 502; 61 Am. Dec. 706; Mills v. Mills, 28 Barb. 454; Mitteer v. Wiley, 34 Iowa, 214.[a] The courts of New York have adopted this construction of the rule in the most positive manner. In Bull v. Church, 5 Hill, 207, 2 Denio, 430, 43 Am. Dec. 754, the testator gave all his property, real and personal, to his wife during widowhood, and then to his children. She enjoyed the provision made by the will for a while, and then married a second time. She was held entitled to dower in all the

(a) See, also, Hunter v. Hunter, 95 Iowa, 728, 58 Am. St. Rep. 455, 64 N. W. 656; Howard v. Watson, 76 Iowa, 229, 41 N. W. 45; Bare v. Bare, 91 Iowa, 143, 59 N. W. 20; Watson v. Watson, 98 Iowa, 132, 67 N. W. 83; Sutherland v. Sutherland, 102 Iowa, 535, 63 Am. St. Rep. 477, 71 N. W. 424; Estate of Proctor, 103 Iowa, 232, 72 N. W. 516. The rule as to a devise of a life estate in all of the property has been changed, in Iowa, by statute: Percifield v. Aumick, 116 Iowa, 383, 89 N. W. 1101.

of cases rejects this view, holds that the life estate under the will and the dower right in the same lands are necessarily inconsistent, and therefore that the widow must elect between the two. Her election in favor of the will by accepting its provision, according to this construction, defeats any subsequent claim for dower in the lands devised.[3]

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lands, as her interest under the will had ended. In Lewis v. Smith, 9 N. Y. 502, 61 Am. Dec. 706, the testator gave his wife the use of all his estate, real and personal, during her life, and empowered his executor to sell the real estate, and pay the proceeds to his wife for her enjoyment during life. The acceptance of this provision was held not inconsistent with her enforcement of her dower right. In Sandford v. Jackson, 10 Paige, 266, testator devised all his property, real and personal, to his wife and to two others, to be held for her use as long as she should remain his widow, and until his youngest child should become of age, and then a division was to be made. She enjoyed the provision made by the will for a while, and then married. Held, that no case for an election had arisen, and she was entitled to dower in all her husband's lands.[b]

[3] Hamilton v. Buckwalter, 2 Yeates, 389, 392; 1 Am. Dec. 350; Stark v. Hunton, 1 N. J. Eq. 217, 224, 225; Smith v. Bone, 7 Bush, 367; Wilson v. Hayne, Cheves Eq. 37, 40; Caston v. Caston, 2 Rich. Eq. 1; Cunningham v. Shannon, 4 Rich. Eq. 135. Some of these cases seem to have turned, in part at least, upon local statutes. Laying out of view the effect of any statutes, in my opinion the first-mentioned series of cases is based upon the general principle as settled by the courts, rather than the second group. There does not seem to be, in accordance with that principle, any necessary inconsistency between such a devise to the widow and her claim of dower in the same lands, which would, of course, only be made where the testamentary gift had failed. It is clear that there is no such inconsistency between her claim of dower and a devise of lands to third persons, either for their lives or in fee; that is, the gift itself, for life or in fee, does not create the antagonism required by the rule. It is said that a life estate in lands directly conferred by the will precludes the notion of another legal life estate in the same lands held by the same person. It may be conceded that *at law* two such estates in the same lands cannot exist at the same time vested in the same person. In equity,

(b) In Estate of Zahrt, 94 N. Y. 605, the testator devised to his wife during her life "the rents, income, interest, use, and occupation of all his estate," upon condition that she keep the buildings and personal property insured, pay all taxes and assessments, and keep the estate in good repair. This requirement was held to be inconsistent with her dower right, and put her to her election. In Estate of Gotzian, 34 Minn. 159, 57 Am. Rep. 43, 24 N. W. 920, where the testamentary disposition to the widow was practically the same as her statutory fee-simple "dower," it was held that she was put to an election. The cases chiefly relied upon were from states enumerated in § 494, *ante*, where the presumption is in favor of an election; the reasoning of the court, if not its actual decision, appears to proceed upon a misapprehension of the true principle.

The conclusion reached by the former series of decisions seems to be in agreement with the settled doctrines of equity jurisprudence.

§ 499. **Devise in Trust to Sell, or with a Power of Sale.**— It is also a settled rule, both in England and in the American states, where statutes have not interfered, that, after a legacy, annuity, or other provision made for the wife, a devise of lands which are subject to dower, or of all the testator's lands, to trustees, on trust, to sell, or with power given to the executors to sell, for any purpose, is not inconsistent with the widow's claim of dower in the lands so devised, and therefore no necessity for an election by her is created. The will, in such case, is to be interpreted as though it had expressed the intention for the lands to be sold subject to the widow's dower. This conclusion is the same, even although the will directs that an interest in some part of the proceeds of the sale should be given or secured to the widow.[1] Some special provision of the will,

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however, this legal rule does not prevail. Equity admits the possibility of two estates co-existing in the same person, and will always keep both the simultaneous estates alive whenever such a result is necessary to protect the equitable interests and rights of the party.

[1] French v. Davies, 2 Ves. 572; Ellis v. Lewis, 3 Hare, 310; Dowson v. Bell, 1 Keen, 761; Gibson v. Gibson, 1 Drew. 42, 57; Bending v. Bending, 3 Kay & J. 257. In Ellis v. Lewis, 3 Hare, 310, the testator devised all his real estate to a trustee, upon trust, to sell and to convey the same to purchasers, and to hold the proceeds, together with the residue of his personal estate, upon trust, to pay one half of the interest and income thereof to his wife during her widowhood, and the other half (and the whole after his widow's death or marriage) to his sister for her life, and finally, to pay the principal of such fund to the children of the testator's said sister. Wigram, V. C., decided that no case of election arose; that the widow was entitled to the benefit given by the will, and also to her dower in all the lands. He laid down the rule as follows: "I take the law to be clearly settled at this day that a devise of lands *eo nomine*, upon trust, for sale, or a devise of lands *eo nomine* to a devisee beneficially, does not, *per se*, express any intention to devise the lands otherwise than subject to their legal incidents, that of dower included. There must be something more in the will, something inconsistent with the enjoyment by the widow of her dower, by metes and bounds, or the devise, standing alone, will be construed as I have stated. [Authorities are here referred to.] If that be so, it is impossible, in the case of a devise of lands upon trust for sale, that any direction for the application of the proceeds of such sale can affect the case. The devise is of land subject to dower. The

however, in addition to the mere trust, or power to sell, and to the direction for distributing the proceeds, may create the inconsistency which prevents this rule from applying, and requires an election by the widow.[2][b]

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trust to sell is a trust to sell subject to dower; and the proceeds of the sale will represent the gross value of the estate, minus the value of the dower. Whatever, direction, therefore, for the mere distribution of the proceeds the will may contain, that direction must leave the widow's right to dower untouched. . . . . I found myself on these two propositions: 1. That a devise of land upon trusts for sale does not, *per se*, import an intention to pass the land otherwise than subject to the legal incident of dower; and 2. That the direction to divide the proceeds of the sale cannot decide what the subject of sale is; and there is no circumstance affecting the proposition in its application to the present case." The American cases adopt the same rule, and upon the same course of reasoning: Adsit v. Adsit, 2 Johns. Ch. 448; 7 Am. Dec. 539; Bull v. Church, 5 Hill, 207; 2 Denio, 430; 43 Am. Dec. 754; Fuller v. Yates, 8 Paige, 325; Wood v. Wood, 5 Paige, 601; 28 Am. Dec. 451; Lewis v. Smith, 9 N. Y. 502; 61 Am. Dec. 706; Whilden v. Whilden, Riley Ch. 205; Hall v. Hall, 8 Rich. 407; 64 Am. Dec. 758; Gordon v. Stevens, 2 Hill Ch. 46; 27 Am. Dec. 445; Timberlake v. Parish's Ex'r, 5 Dana, 345; Kinsey v. Woodward, 3 Harr. (Del.) 459.[a]

[2] Thus in Vernon v. Vernon, 53 N. Y. 351, 362, a testator who owned an undivided half of certain land directed his executors to sell his own share therein, *at a price fixed by him in the will*, or else to take a conveyance of the other half from his co-owner at the same price for which he authorized his own share to be sold. The court held that this direction showed a clear intention on the testator's part to transfer, in case of a sale, the whole title to his own land, free from any claim of dower; and the widow was therefore put to an election. See also Savage v. Burnham, 17 N. Y. 561, 577. In Herbert v. Wren, 7 Cranch, 370, 379, there is a *dictum* of Chief Justice Marshall concerning the presumption as to the testator's intention, arising from a direction to sell the residue of his real estate *for the purpose of paying his debts*, which would limit the generality of the language used by Vice-Chancellor Wigram, quoted in a preceding note. And see, on this point, Norris v. Clark, 10 N. J. Eq. 51.

(a) Konvalinka v. Schlegel, 104 N. Y. 125, 58 Am. Rep. 494, 9 N. E. 868; where it was held that no necessity for an election existed, although the proceeds of the sale were directed to be divided between the testator's wife and children, "share and share alike."

(b) See, also, Bannister v. Bannister, 37 S. C. 529, 16 S. E. 612. In In re Gorden, 172 N. Y. 25, 92 Am. St. Rep. 689, 64 N. E. 753, reviewing the New York cases, the rule is thus laid down: "While a mere power of sale, to be promptly exercised for the purpose of distribution, does not put the widow to her election, the vesting of title in trustees not only with power to sell and reinvest, but with special directions as to control and management and the payment over of the annual income to the widow and children, during the term of the trust, we regard as sufficient."

§ 500. An Annuity or Rent-charge Given to the Widow Charged upon Lands Devised to Others.— The question as to the effect of an annuity or rent-charge given to the widow, and charged upon lands subject by the law to her dower, which are at the same time devised to others, gave rise to some discrepancy among the earlier decisions, but has been completely settled by the whole current of modern authority.[1] The rule may be regarded as firmly established, that an annuity or a rent-charge created by the testator in his will in favor of his widow, and charged upon lands in which she is otherwise dowable, or upon his real and personal property, which are at the same time devised and bequeathed to others, is not of itself, and without additional

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[1] I shall depart from the rule which I have usually observed, not to refer to or comment upon the opinions expressed by other writers, for the purpose of making a few comments upon the doctrine laid down in a work of great value. In the American edition of White and Tudor's Leading Cases in Equity (4th ed., vol. 1, pp. 564–568), the note of the American editor draws a distinction between wills creating an annuity for the wife chargeable on personal and real property both, and wills creating a *rent-charge* chargeable on real estate alone, maintains the doctrine that the former kind of provision alone creates no necessity for an election by the widow, while the latter is inconsistent with a claim of dower, and puts the widow to an election, and insists that all the English cases, the most recent as well as the earliest, recognize this distinction, and make it the foundation of their decisions. I do not purpose to examine this opinion upon principle, but simply to show the exact position of the English cases, with reference to the alleged distinction. A careful examination of the English cases will show that, so far from recognizing and upholding this distinction between an annuity and a rent-charge, they expressly reject it; not one modern decision is based upon it; the opinions uniformly treat the effect of the two provisions as exactly the same, and in certain of the most important and authoritative cases the court examines the question and pronounces against the doctrine, which had been suggested in the arguments of counsel. It is true that there are a few early cases which have been supposed to maintain such a view, and have sometimes been regarded as authorities in support of the distinction. They are Villa Real v. Lord Galway, 1 Brown Ch. 292, note; Amb. 682; Arnold v. Kempstead, Amb. 466; 2 Eden, 236; Wake v. Wake, 3 Brown Ch. 255; and Jones v. Collins, Amb. 730. Of these, Villa Real v. Lord Galway, 1 Brown Ch. 292, note, is the leading case. It should be observed, however, that even these cases are not any authority for the particular distinction which I have described; so far as they bear upon the point, they go too far, since they purport to hold that *even an annuity charged* by the testator upon his property is inconsistent with the widow's dower. But these cases, so far as they bore upon this question at all, and attempted to lay down any rule concerning the effect of such a provision in the will, have been repeatedly overruled; if supported *as decisions*, and recognized as authorities *for any purpose*, it is upon entirely different and distinct matters and testamentary provisions. The case of Hall v. Hill, 1 Con. & L. 129, decided by Sir Edward Sugden when lord chancellor of Ireland, has been regarded by courts and writers as of the highest authority. He reviews the decision in Villa Real v. Lord Galway, 1 Brown Ch. 292, note, and says, concerning it, that Lord Camden evidently intended to

put the case simply and entirely upon the gift of an *annuity*, which he held was inconsistent with dower: "It is quite impossible to say that Lord Camden's authority has remained untouched on that point, because the abstract question is quite settled that an annuity out of the estate is now held not to have the effect of barring the wife of her dower as inconsistent with it. But it is very singular that, although this is the perfectly settled law of the court, all the subsequent authorities have taken care to save whole the decision of Lord Camden in Villa Real v. Lord Galway, 1 Brown Ch. 292, note, and have endeavored and indeed have distinguished it. In Birmingham v. Kirwan, 2 Schoales & L. 444, Lord Redesdale put the case upon *all the circumstances*,— the directions in the will with respect to the management of the whole estate, the payment of the annuity, and the accumulation during the minority of the child — which circumstances, in his opinion, were sufficient to authorize the decision. So, again, Lord Lyndhurst, in Roadley v. Dixon, 3 Russ. 192, comes to the same conclusion. Both held Villa Real v. Galway, 1 Brown Ch. 292, note, a binding authority, *but both on a ground which Lord Camden cautiously abstained from resting his judgment upon.* I think, myself, that Villa Real v. Lord Galway, 1 Brown Ch. 292, note, may be considered an authority on the grounds suggested; but I cannot say that it is an authority on the abstract question, because I consider that the abstract question has been decided the other way." In Roadley v. Dixon, 3 Russ. 192, the question was directly presented, and argued with great fullness. The counsel on one side, Mr. Sugden, afterwards lord chancellor, raises the exact point, and shows that no difference between an annuity charged on property generally, and a rent-charge on the real estate, has been made by the decisions. See pp. 196–198. He commented on Villa Real v. Lord Galway, 1 Brown Ch. 292, note, and the three other cases similar to it, and said: "If it be law that a widow is put to her election *by the mere bequest of a rent-charge, almost every judge of this court has been ignorant of one of its most important rules;* and if such be not the law, the decision of Lord Camden cannot be sustained." The opposing counsel, one of the ablest equity lawyers, and afterwards a distinguished vice-chancellor, Mr. Shadwell, distinctly and expressly conceded that *a mere rent-charge* was not inconsistent with dower. He said (p. 198): "Villa Real v. Lord Galway, 1 Brown Ch. 292, note, has never been overruled; it still must be considered as affording the rule of decision, *whenever a like state of facts occurs. The question is not as to the effect of a simple bequest of a rent-charge*, but on the effect of all the dispositions contained in the will." He then goes on to show that in addition to the rent-charge upon a certain specified estate devised, the will contains other dispositions inconsistent with dower, such as a power of management and occupation given to trustees, which, it had been settled, are inconsistent with dower; and in this respect the case was exactly like that of Villa Real v. Lord Galway, 1 Brown Ch. 292, note. Lord Chancellor Lyndhurst examined the decisions in Villa Real v.

provisions in the will concerning the property bestowed, inconsistent with the widow's claim to dower in the same lands, and does not of itself, therefore, create the necessity for an election between the annuity or rent-charge and her dower.[2]

Lord Galway, 1 Brown Ch. 292, note, and in the other similar cases (pp. 201, 202). He expressly holds that Villa Real v. Lord Galway, 1 Brown Ch. 292, note, cannot be supported upon the ground which Lord Camden took in deciding it, viz., that an annuity or a rent-charge was inconsistent with dower; but nevertheless that case should not be completely overruled; the decision was correct *upon all the facts of the case*, and was a binding authority upon the same condition of facts. What were the facts? In addition to the rent-charge, the will gave the trustees power to hold and possess and manage the lands devised, to receive all the rents and profits, and to accumulate them during the minority of an infant, etc. These provisions, all taken together, were inconsistent with any claim for dower. This examination demonstrates the following conclusions: 1. The English decisions do not recognize, and are not rested upon, any assumed distinction between the effect of a rent-charge upon land alone, and an annuity charged upon both personal and real estate; 2. The few early cases which were once regarded as furnishing some authority for such a distinction have been expressly repudiated, and their decisions are made to rest upon entirely different provisions in the wills; 3. The more recent English cases cited in the next note all lay down exactly the same rule with reference to an annuity and a rent-charge.

There may be a few American cases which recognize the distinction, and which make it the basis of decision; but it will be seen that they are nearly, if not quite, all of them early cases, and expressly follow the supposed authority of Villa Real v. Lord Galway, 1 Brown Ch. 292, note, and the others of the same class. The question naturally has not often arisen in this country, since wills creating rent-charges upon particular real estate are very infrequent.

[2] And a clause giving her the remedy of entry and distress in case of non-payment is not an additional provision which renders an election necessary: Pitts v. Snowden, 1 Brown Ch. 292, note; Pearson v. Pearson, 1 Brown Ch. 291; Foster v. Cook, 3 Brown Ch. 347; Birmingham v. Kirwan, 2 Schoales & L. 444, 453, per Lord Redesdale; Hall v. Hill, 1 Con. & L. 129, 1 Dru. & War. 103, per Sir Edward Sugden; Roadley v. Dixon, 3 Russ. 192, 201, 202, per Lord Lyndhurst; Dowson v. Bell, 1 Keen, 761, per Lord Langdale; Harrison v. Harrison, 1 Keen, 765, per Lord Langdale; Holdich v. Holdich, 2 Younge & C. 18, per Knight Bruce, V. C. The early cases of Villa Real v. Lord Galway, 1 Brown Ch. 292, note, Arnold v. Kempstead, Amb. 466, 2 Eden, 236, Jones v. Collier, 2 Eden, 730, and Wake v. Wake, 3 Brown Ch. 255, 1 Ves. 335, so far as they lay down any different doctrine, have been repeatedly explained, limited, and overruled. See Birmingham v. Kirwan, 2 Schoales & L. 444, 453, per Lord Redesdale; Hall v. Hill, 1 Con. & L. 129; 1 Dru. & War. 103, per Sir Edward Sugden; Roadley v. Dixon, 3 Russ. 192, 201, 202, per Lord Lyndhurst; and see the comments upon these cases in the last preceding note. The American cases are few, but the decided weight of authority is in support

§ 501. **Power of Occupying, Enjoying, Managing, and Leasing Expressly Given to Devisees.**— The rule is settled by the English cases that where, after or in connection with a provision for the widow's benefit, the testator expressly prescribes the mode in which the lands devised shall be possessed, occupied, enjoyed, or managed by the devisees, this disposition shows a clear intention on his part to give the entirety of the lands, which is inconsistent with any claim of dower, and therefore a case for an election is raised. It is also settled by a unanimous consent of the English authorities, as a particular instance of this rule, that where, after a provision is made for the widow, the lands are devised to trustees, upon trust, for any purpose, with power or directions given to the trustees to occupy, or possess, or manage, or lease, or even to cut down timber on any part of the lands, such mode of disposition is inconsistent with the claim of dower, and makes an election necessary. That a power of management and of leasing given to the trustees is inconsistent with dower is established by an overwhelming array of decisions.[1] In connection with this form of

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of the rule as settled by the English courts, and as stated in the text: Smith v. Kniskern, 4 Johns. Ch. 9; and Adsit v. Adsit, 2 Johns. Ch. 448; 7 Am. Dec. 539, opinion of Chancellor Kent; Lasher v. Lasher, 13 Barb. 106; Hatch v. Bassett, 52 N. Y. 359;[a] but, *per contra*, White v. White, 16 N. J. L. 202, 211; 31 Am. Dec. 232.

[1] Birmingham v. Kirwan, 2 Schoales & L. 444; Miall v. Brain, 4 Madd. 119; Butcher v. Kemp, 5 Madd. 61; Goodfellow v. Goodfellow, 18 Beav. 356. In Birmingham v. Kirwan, 2 Schoales & L. 444, a testator devised a house and grounds to trustees, upon trust, to permit his wife to enjoy the same for her life, she paying a small rent per acre for the land, and to keep the house in repair, and not to let it, and devised the residue of his lands to third persons. Lord Redesdale held that the disposition made for the widow was inconsistent with her claim of dower in the house and grounds thus given for her use, but she was entitled to dower in the residue devised to the third persons. In Miall v. Brain, 4 Madd. 119, a testator devised all his real and personal estate to trustees, upon trust as to a certain specified house and grounds, for his widow during her life, and to pay her out of the rents and profits of the estate a certain annuity for her life, and upon the further trust to permit his daughter to use, occupy, and enjoy a certain other house and grounds for her

(a) To the same effect, see the recent cases of Horstmann v. Flege, 172 N. Y. 381, 65 N. E. 202, reviewing the English authorities; Heirs of Rivers v. Gooding, 43 S. C. 428, 21 S. E. 310.

disposition the rule seems to be settled by the English courts, that where a testator devises the whole of his property together in general terms, and it is manifest that it was his intention that one part of the property should not be subject to dower, it follows that no part of the property embraced in the one general disposition should be considered as so subject.[2]

§ 502. **Devise to Widow and Others in Equal Shares.**— The rule is also settled in England by a current of decisions that where a testator devises lands, which are by law subject to dower, in express terms, to his widow and others,— as, for example, his children,— in equal shares, this provision for an equality among the devisees is inconsistent with a claim of dower, and creates the necessity for an election by the widow.[1] [a] Although this rule is sustained by the

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life, and the residue was to be divided among his children. Sir John Leach, M. R., held that the provision for the daughter showed a plain intent to devise the entirety, and was inconsistent with any dower in the same premises, "and that the same intention must necessarily be applied to the whole estate which passes by the same devise." In Butcher v. Kemp, 5 Madd. 61, a testator, having devised some lands to his wife for her life, and given her certain legacies, devised a farm to trustees during the minority of his daughter, and directed them to carry on the business of the farm, or let it on lease during the daughter's minority. Sir John Leach held that the widow was put to her election. "This case is within the principle of Miall v. Brain, 4 Madd. 119, which was lately before me, in which I held the claim of dower necessarily excluded by the gift of a house for the personal occupation and enjoyment of the testator's daughter." The following cases are authorities for the rule that power or direction given to trustees to manage or lease, etc., is inconsistent with dower: Roadley v. Dixon, 3 Russ. 192; Parker v. Sowerby, 4 De Gex, M. & G. 321; 1 Drew. 488; Thompson v. Burra, L. R. 16 Eq. 592; Hall v. Hill, 1 Dru. & War. 94; 1 Con. & L. 120; Raynard v. Spence, 4 Beav. 103; Taylor v. Taylor, 1 Younge & C. 727; Lowes v. Lowes, 5 Hare, 501; Pepper v. Dixon, 17 Sim. 200; Grayson v. Deakin, 3 De Gex & S. 298; O'Hara v. Chaine, 1 Jones & L. 662; Holdich v. Holdich, 2 Younge & C. 22. It is upon this ground that the decision in Villa Real v. Lord Galway, 1 Brown Ch. 292, is sustained.

[2] Miall v. Brain, 4 Madd. 119, per Sir John Leach; Roadley v. Dixon, 3 Russ. 192, per Lord Lyndhurst.

[1] Chalmers v. Storil, 2 Ves. & B. 222; Dickson v. Robinson, Jacob, 503; Roberts v. Smith, 1 Sim. & St. 513; Reynolds v. Torin, 1 Russ, 129, 133. In

(a) See, to the same effect, Durfee's Petition, 14 R. I. 47; In re Purcell (R. I.), 57 Atl. 377; McGregor v. McGregor, 20 Grant (Can.) C. Rep. 450; Closs v. Eldert, 37 N. Y. Supp. 353, 16 Misc. Rep. 104; Helme v. Strater, 52 N. J. Eq. 591, 30 Atl. 333.

authority of several direct decisions, it cannot be reconciled with the general principle, which underlies all cases of election between a testamentary disposition for the widow and her dower,— the principle that a testator is to be presumed to have intended to devise only what belonged to him and what he was able to give. The correctness of the rule has been repeatedly questioned.[2] [b]

§ 503. **Election in Devises of Community Property.**— In California and a few other states the common-law dower has been wholly abolished, and a species of interest, borrowed from the French and Spanish laws, has been introduced, called "community property." This community property embraces both what at the common law would be real and personal estate, and in fact substantially the same rules govern the devolution of things real and things personal. The law of these states recognizes two kinds of property which may belong to the spouses in case of marriage,— the "separate property" and the "community property." The separate property of either husband or wife is what he or she owned at the time of marriage, and

Chalmers v. Storil, 2 Ves. & B. 222, a testator said: "I give to my dear wife and my two children all my estates whatsoever, to be equally divided among them, whether real or personal," and afterwards specified the property given. Sir William Grant, M. R., held that this disposition was totally inconsistent with the claim of dower. "The testator directing all his real and personal estate to be equally divided, the same equality is intended to take place in the division of the real as of the personal estate, which cannot be if the widow takes out of it her dower, and then a third of the remaining two thirds." In the other cases cited, similar dispositions were made in the wills, and the same reasoning was used and the same conclusion reached by Sir Thomas Plumer, M. R., in one, and by Sir John Leach, V. C., in another.

[2] Where the testator devises all his estates to his widow and children, to be equally divided among them, the general principle can easily apply, that he intended to devise only what belonged to him, and that the equal division should therefore be made after the widow's dower had been assigned. Such a proceeding would fully satisfy the language of the will. See Ellis v. Lewis, 3 Hare, 315; and Bending v. Bending, 3 Kay & J. 261, per Page Wood, V. C.

(b) This paragraph of the text is quoted, and the author's comments on the English rule approved and followed, in In re Hatch's Estate, 62 Vt. 300, 18 Atl. 814, 22 Am. St. Rep. 109.

what he or she acquired during marriage by inheritance, devise, bequest, or gift, and the rents and profits thereof. The separate property of each spouse is wholly free from all interest or claim on the part of the other, and is entirely under the management, control, and disposition, testamentary or otherwise, of the spouse to whom it belongs. All other property is community. It is a settled doctrine that all property acquired by the husband after the marriage, and during its continuance, is presumed to be community. During the marriage the husband alone has the custody, control, management, and power of disposition of the community property, and it is liable for his debts; but still in theory the wife has an inchoate, undivided interest in it during the entire coverture, so that the husband cannot transfer it by mere gift or otherwise with the intent and purpose of defrauding her of her share, or of defeating her exclusive interest expectant upon his death.[a] Upon the death of the wife, the entire community property vests in the husband, without the necessity of any administration. Upon the death of the husband, the community property is first subject to the payment of debts and expenses of administration, and of the residue the widow is entitled absolutely to one undivided half, which is partitioned, and set apart, and vested in her in the proceedings for administering upon the estate; while the other half is subject to the testamentary disposition of the husband, or if he dies intestate, devolves upon specified persons as his "heirs." In other words, the husband's power extends only to one half of the community property, and he cannot by will devise or bequeath it in any manner or to any person so as to infringe upon the widow's vested right to one half.[1] [b] With respect to the widow's election, whenever the husband has made a provision for her benefit, and has assumed to dispose of all the remaining community property, the California code has only legislated by prescribing the time within which her election must be made, *in cases where an election is necessary,* and by declaring that certain conduct by her shall amount to an election. The more important question, when a case for election arises from the provisions of a will, is left to be determined by the settled doctrines of equity jurisprudence which deal with that subject-matter.

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[1] See Cal. Civ. Code, § 1402.

(a) By Cal. Civ. Code, sec. 172, amendment of 1891, a voluntary conveyance of community property is invalid unless the wife joins therein.

(b) The greater part of this paragraph is quoted in Pratt v. Douglas, 38 N. J. Eq. 516, 535.

§ 504. In all the cases which have hitherto arisen upon wills purporting to dispose of all the community property, or to dispose of more than the husband's share, the courts of California have proceeded strictly upon the analogy between the widow's interest in the community property and her common-law right of dower, and have fully adopted the general doctrine which has been established in England and in many of the American states concerning election between a testamentary provision for the widow and her legal dower right.[a] It might, perhaps, have been argued that there is a close analogy between this peculiar kind of ownership called community property and the case of a testator who owns only an undivided share in specific lands which he disposes of by his will, and that the particular rule established by the English decisions in relation to this latter condition of fact might properly be applied to a testamentary disposition made by a testator of the entire community property, of which he is only empowered to bequeath an undivided half. It is unnecessary to discuss the correctness of such a supposed analogy; it is enough to say that the courts have not adopted it, nor applied the particular rule to which I have referred. They have expressly followed the leading authorities dealing with the wife's dower, and have extended to the widow's share of the community property both the reasoning which has been employed and

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(a) The text is quoted in Pratt v. Douglas, 38 N. J. Eq. 516, 536.

the conclusions which have been reached in regard to the necessity of election between a claim of dower and the benefits given by a husband's will.

§ 505. It cannot be said that the courts have settled any special rules applicable to particular forms of devise or bequest by the husband, but the general rule for the determination of all cases they have established in a very clear and certain manner. Whenever a husband has made some testamentary provision for his wife, and has also assumed to dispose of more than his own half of the community property, in order that she shall be put to her election, the testamentary provision in her behalf must either be declared in express terms to be given to her in lieu of her own proprietary right and interest in the community property, or else an intention on his part that it shall be in lieu of such proprietary right must be deduced by clear and manifest implication from the will, founded upon the fact that the claim to her share of the community property would be inconsistent with the will, or so repugnant to its dispositions as to disturb and defeat them. An intent of the husband to dispose of his wife's share of the community property by his will, and thus to put her to an election, will not be readily inferred, and will never be inferred where the words of the gift may have their fair and natural import by applying them only to the one half of the community property which he has the power to dispose of by will.[1]

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[1] The courts have expressly relied on and followed the line of cases of which Adsit v. Adsit, 2 Johns. Ch. 448, 7 Am. Dec. 539, and Fuller v. Yates, 8 Paige, 325, are examples: Beard v. Knox, 5 Cal. 252, 257; 63 Am. Dec. 125; In re Buchanan's Estate, 8 Cal. 507, 510; Smith v. Smith, 12 Cal. 216, 225; 73 Am. Dec. 533; Scott v. Ward, 13 Cal. 458, 469, 470; Payne v. Payne, 18 Cal. 292, 301; Burton v. Lies, 21 Cal. 87, 91; Morrison v. Bowman, 29 Cal. 337, 346–348; In re Silvery, 42 Cal. 210; Broad v. Murray, 44 Cal. 229; King v. Lagrange, 50 Cal. 328; In re Estate of Frey, 52 Cal. 658.[a]

(a) The text is quoted in Pratt v. Douglas, 38 N. J. Eq. 516, 536. See, also, In re Gilmore, 81 Cal. 240, 22 Pac. 655; Estate of Gwin, 77 Cal. 313, 19 Pac. 527; Estate of Stewart, 74 Cal. 98, 15 Pac. 445; Estate of Smith, 108 Cal. 115, 119, 40 Pac. 1037; Estate of Wickersham, 138 Cal. 355, 363, 70 Pac. 1076; Moss v. Helsley, 60 Tex. 426. In Pratt v. Doug-

§ 506. The Remaining Questions Stated.— I have thus far discussed the subject of election considered as an equitable obligation resting upon a donee under certain circumstances, and have described at large the most important instances in which the necessity for an election is created by

In Beard v. Knox, 5 Cal. 252, 257, 63 Am. Dec. 125, which is the leading case in the state, a husband, being possessed of property worth twelve thousand five hundred dollars, all community, bequeathed five hundred dollars to his wife, and all the residue to a daughter. The widow brought this action, claiming that she was entitled to one half of the entire estate of her own right, and also to the legacy of five hundred dollars, payable out of the one half which was at the disposal of her husband. It was urged by the defendant that by claiming and receiving the legacy she had precluded herself from asserting her legal right to the statutory half of the community property. The court sustained her contention in full, and held that no necessity for an election was created by such a disposition. This decision has been reaffirmed in all the other cases cited above, several of which are similar in their facts. In Payne v. Payne, 18 Cal. 292, 301, a husband, leaving a wife and children, gave all of his property, being community, to his wife absolutely. The court held that she took one half of the estate absolutely as of her own right by virtue of the community, and the other one half under and by virtue of the will. In the case of Silvery's Estate, 42 Cal. 210, a husband left all of his property, which was entirely community, to his wife for her life, and after her death the whole to be equally divided among his children. It was argued for the children that the widow must elect; but the court held that the general language of the will must be confined to the one half which the testator was able to dispose of; that the widow took one half absolutely as her own, and the other half for her life, with remainder to the children, and no necessity for an election arose. In the case of Frey's Estate, 52 Cal. 658, the testator gave one half of all his property, part being his separate estate and part community, to his wife, and the other half to nephews and nieces. The widow was held not bound to elect; the general language of the will must be confined in its operation to the share of the property which the testator could bequeath. King v. Lagrange, 50 Cal. 328,[b] is a very strong case. A testator owning land, all of which was community property, devised it all to his wife, with a power of sale, however, given to the executor, which, of course, was confined in its legal effect to the half of the real estate capable of being disposed of by the testator. The executor, in ignorance of the law concerning community property, sold all the land devised by virtue of his power; the purchaser, in like ignorance, supposed he was buying the entire estate, and the widow, in like ignorance, received the purchase-money for the whole. Held, that the widow

las, *supra*, the courts of New Jersey had occasion to examine the law of California on the subject of election in cases of community property, and the conclusions stated in the text were adopted and approved.

(b) Affirmed, 61 Cal. 221.

the provisions of an instrument of donation. I shall finish my treatment of the subject by examining the various incidents which may be connected with election in any of its aspects, and by which the rights and duties of the parties who are bound to elect are affected. The most important

was not thereby precluded from setting up and enforcing a claim to the half of the land which, as community property, belonged to her of her own right, and that the will did not present a case for an election. Even if an election had been necessary, the acts of the widow, being done in ignorance of the true facts and of her own rights, would not have amounted to an election. In Morrison v. Bowman, 29 Cal. 337, an election was held to be necessary. One Smith devised to his wife, for her life, one third of the Bodega rancho, and the house and furniture thereon, which rancho and all the property thereon was his separate estate, with remainder in fee to his children born from her, and the remaining two thirds of said rancho and property thereon he gave in fee to the same children. He also owned another rancho, which was all community property, called the Blucher rancho. The greater part of this he gave in specified portions for life to children, remainder in fee to grandchildren by a former wife. The will added that a certain portion of this Blucher rancho was left undisposed of by the foregoing provisions; that the testator intended during his lifetime to sell such portion for the purpose of raising funds to pay off his debts; but if this portion, or any of it, remainded unsold, he directed his executors to sell the same and pay debts, and any surplus which should be still remaining after the debts were paid, he directed his executors to distribute, one third to his widow and the other two thirds to his children in a prescribed manner. The court, after laying down the general doctrine as stated in the text, held that the assertion by the widow of her right to one half of the community property would be inconsistent with and antagonistic to the dispositions made by the testator to herself and to his children and grandchildren, and therefore the will created the necessity for an election by the widow. While the opinion in this carefully considered case undoubtedly adopts the general doctrine as it has been established by the overwhelming weight of authority, yet it is more than doubtful whether this general doctrine was correctly applied to the facts. Comparing the provisions of the will with those found in very many of the decisions based upon the widow's dower, there does not seem to be anything in the language used by the testator which cannot, in pursuance of the settled rule of interpretation, be confined in its operation to the share of the community property capable of being disposed of by him, and thus no necessary antagonism arises.(e) See also the following cases, decided by the probate court of San Francisco: In re Estate

(e) For further instances of a sufficient manifestation of intent to put to an election, see Estate of Stewart, 74 Cal. 98, 15 Pac. 445; Estate of Smith, 108 Cal. 115, 40 Pac. 1037. In the latter case the testator undertook in terms to dispose of all the property of the community, and declared that the will was made with full knowledge of the property rights of the husband and wife, and with her consent.

of these incidents which remain to be considered are the following: 1. The persons who may elect, and especially persons under disabilities; 2. Rights and privileges of those who are bound or entitled to elect; 3. Time of election; 4. Mode of election, whether express or implied; 5. Effect of an election upon third persons, and upon the parties directly concerned in the donation; and 6. The equitable jurisdiction in cases of election. It will be found that in many of the states the time, and to a certain extent the mode, of electing in cases of dower — by far the most frequent occasion for election in this country — have been definitely fixed and regulated by positive statutes; and in several of the states the whole subject of election by widows, with reference to their dower and similar rights, is governed by precise statutory rules. The doctrine of election and questions under it are by such legislation wholly withdrawn from the domain of equity jurisprudence and jurisdiction; the rules are made strictly legal, and are applied in the ordinary administration of decedents' estates. These statutes, and the effects produced by them, do not, therefore, properly come within the scope and purpose of a treatise upon equity jurisprudence.

§ 507. Who may Elect — Persons under Disabilities.— Wherever a case involves the necessity for an election, it is an elementary rule that any person who is *sui juris* — not under disabilities — is both entitled and bound to elect.[a] Thus we have seen that an heir at law, a widow, a devisee, appointee, or any other donee, if the facts of the case re-

of Staus, Myrick's Prob. Rep. 5; In re Estate of Mumford, Myrick's Prob. Rep. 133; In re Estate of Low, Myrick's Prob. Rep. 148; In re Estate of Ricaud, Myrick's Prob. Rep. 158; In re Estate of Patton, Myrick's Prob. Rep. 243.[d]

(d) The recent California cases fully sustain the earlier decisions, to the effect that a devise or bequest of "all the property of which I may die possessed," or of "all my property," or of "all my lands," will not create a necessity for an election. See Estate of Gwin, 77 Cal. 313, 19 Pac. 527; Estate of Gilmore, 81 Cal. 240, 22 Pac. 655.

(a) The text is quoted in Drake v. Wild, (Vt.) 39 Atl. 248.

quire an election, may and must elect. The only particular persons to be considered are those laboring under disabilities or incapacities of legal *status.*

§ 508. **Married Women.**—The question has arisen where the common-law doctrines concerning the legal incapacities of married women still prevail. There has been some conflict of opinion with reference to the competency of a married woman to elect, so as to bind herself and her property without the intervention of a court, or the active participation of her husband. It is now settled that a married woman is competent to elect by her own act without the intervention of the court; and although the election affects her real estate, it need not be by an acknowledged deed. There undoubtedly are cases in which a reference has been directed by the court to inquire in which way it would be most for the interest of a married woman to elect under the circumstances; but the rule is now established, that, at least *prima facie,* or under ordinary circumstances, she is able to elect for herself in a valid and binding manner.[1]

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[1] Note of Mr. Swanston to Gretton v. Haward, 1 Swanst. 409, 413; Barrow v. Barrow, 4 Kay & J. 409, 419; Ardesoife v. Bennett, 2 Dick. 463; Willoughby v. Middleton, 2 Johns. & H. 344; Anderson v. Abbott, 23 Beav. 457; Savill v. Savill, 2 Coll. 721; Griggs v. Gibson, L. R. 1 Eq. 685; Brown v. Brown, L. R. 2 Eq. 481; but see Campbell v. Ingilby, 21 Beav. 567; Cooper v. Cooper, L. R. 7 H. L. 53, 67; Tiernan v. Roland, 15 Pa. St. 430, 452; Robinson v. Buck, 71 Pa. St. 386; Robertson v. Stephens, 1 Ired. Eq. 247, 251; McQueen v. McQueen, 2 Jones Eq. 16; 62 Am. Dec. 205; but see Kreiser's Appeal, 69 Pa. St. 194.[a]

(a) See, also, Greenhill v. North British & Mercantile Ins. Co., [1893] 3 Ch. 474; Harle v. Jarman, [1895] 2 Ch. 419; In re Vardon's Trusts, L. R. 31 Ch. D. 275, reversing L. R. 28 Ch. Div. 124, following Smith v. Lucas (Jessel, M. R.), L. R. 18 Ch. Div. 531, and In re Wheatley, L. R. 27 Ch. Div. 606, and disapproving Willoughby v. Middleton, 2 J. & H. 344. In In re Vardon's Trusts, a marriage settlement settled a fund for the separate use of the wife with a restraint on anticipation, and contained a covenant by the wife (then an infant) to settle future property, held, that the wife could not be compelled to elect between after-acquired property and her interest in the settled fund, but was entitled to retain both. The presumption of a general intention that every part of an instrument shall take effect, which is the foundation of the doctrine of election, is here held to be rebutted by the inconsistent particular intention

If her husband also has an interest in the question, and differs in opinion from his wife, a difficulty would certainly exist.[2] In those American states where the modern legislation has destroyed all interest of the husband in his wife's property, and has clothed her, in respect to it, with the capacities and powers of a single woman, and has enabled her to manage, control, and even dispose of it, it seems to follow, as a necessary consequence, that she has the same ability of electing on her own behalf which is possessed by any person completely *sui juris*.

§ 509. **Infants.**— It is very clear that an infant cannot elect. In cases where an infant, if he had been an adult, would be bound to elect, the court has sometimes deferred the question of election, where this could be done without prejudice to the rights of other parties, until the infant came of age.[1] The ordinary rule is for the court to direct an inquiry to be made whether it is for the infant's advantage to elect or not, and what election ought to be made. In other words, the court, as the result of a judicial examination, itself makes the election on the infant's behalf.[2] [a]

A married woman cannot, however, elect so as to deal with or cut off her reversionary things in action: Robinson v. Wheelright, 6 De Gex, M. & G. 535, 546; Whittle v. Henning, 2 Phill. Ch. 731; Williams v. Mayne, 1 L. R. Eq. 519; but *contra*, Wall v. Wall, 15 Sim. 513, 520.[b]

§ 508, [2] See Griggs v. Gibson, L. R. 1 Eq. 685; Wall v. Wall, 15 Sim. 513, 521. A wife cannot, by her election, prejudice or affect her husband's marital rights: Brodie v. Barry, 2 Ves. & B. 127; see Lady Cavan v. Pulteney, 2 Ves. 544; Rutter v. Maclean, 4 Ves. 531.

§ 509, [1] Streatfield v. Streatfield, Cas. t. Talb. 176; 1 Lead. Cas. Eq., 4th Am. ed., 504; Bor v. Bor, 2 Brown Parl. C., Tomlins's ed., 473; Boughton v. Boughton, 2 Ves. Sr. 12.

§ 509, [2] Mr. Swanston's note to Gretton v. Haward, 1 Swanst. 409, 413; Bigland v. Huddleston, 3 Brown Ch. 285, note; Chetwynd v. Fleetwood, 1 Brown Parl. C., Tomlins's ed., 300; Goodwyn v. Goodwyn, 1 Ves. Sr. 228; Ebrington

apparent in the instrument. See, also, Hamilton v. Hamilton, [1892] 1 Ch. 396, following In re Vardon's Trusts.

(b) See, also, Harle v. Jarman, [1895] 2 Ch. 419.

(a) See, also, In re Lord Chesham, L. R. 31 Ch. Div. 466 (*dictum*). This paragraph of the text is quoted, in substance, in Pennington v. Metropolitan Museum of Art, (N. J. Eq.), 55 Atl. 468, by Magie, Ch.

§ 510. **Lunatics.**—In like manner, where the person entitled or bound to elect is a lunatic, the court will make the election on his behalf, after having ascertained, through an inquiry, what action is most for his advantage; and this is the rule, even though the lunatic is under the care of a committee.[1] [a]

§ 511. **Rights and Privileges of Persons Bound to Elect.**—It should be carefully observed that the rules to be mentioned under this head were established in the absence of any legislation upon the subject; they assume that there

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v. Ebrington, 5 Madd. 117; Ashburnham v. Ashburnham, 13 Jur. 1111; Brown v. Brown, L. R. 2 Eq. 481; McQueen v. McQueen, 2 Jones Eq. 16; 62 Am. Dec. 205; Addison v. Bowie, 2 Bland, 606, 623.

[1] In re Marriott, 2 Molloy, 516; Kennedy v. Johnson, 65 Pa. St. 451; 3 Am. Rep. 650. In this latter case it was held that the committee of a lunatic — a widow — cannot elect between the provisions of her husband's will and her dower; that it is the duty of the committee to apply to the court for leave to elect, and the court will only grant permission to elect in favor of either upon a due consideration of the advantages and disadvantages resulting to the lunatic from the choice.

(a) See, in support of the text, Wilder v. Pigott, L. R. 22 Ch. Div. 263; Washburn v. Van Steenwyck, 32 Minn. 336; State v. Neland, 30 Minn. 277; Penhallow v. Kimball, 61 N. H. 596; Van Steenwyck v. Washburn, 59 Wis. 483, 17 N. W. 289, 48 Am. Rep. 532. In Van Steenwyck v. Washburn, 59 Wis. 483, 501, 48 Am. Rep. 532, 17 N. W. 289, it was held that the provision of the Wisconsin statute (Rev. Stats., sec. 2171) requiring a widow to elect does not apply to an insane widow, and an election could not be made by her, nor by her guardian in her behalf. But if proper application be made, the court will make the election for her; and in Washburn v. Van Steenwyck, 32 Minn. 336, it was held that an election so made by the court for its insane ward binds her as to her dower rights in lands in another state. In Crenshaw v. Carpenter, 69 Ala. 572, 44 Am. Rep. 539, it was held that under the Alabama statutes (Code, sec. 2292), the right to elect was personal to the widow, and must be exercised within the time limited therefor, but if she be insane, she cannot dissent from the will; and in a suit for dower, brought after the time limited by the statute for her to elect to take against the will, that the court could not elect for her. Whether the court of chancery had jurisdiction to elect for her, in a suit brought within the time limited by the statute, was expressly not decided. In State v. Neland, 30 Minn. 277, it was held that the court might make the election, or direct her guardian to do it, under the instructions of the court. It was further held that the power to make the election was within the jurisdiction of the probate court.

are no statutes prescribing when an election is necessary, or the time within which an election must be made, or that the suffering a certain period of time to elapse without any affirmative action shall be regarded as an election. Statutes of such a nature, at least concerning widows for whom their husbands have made testamentary dispositions, have been enacted in very many of the states, and have materially affected the equitable rights and privileges of those persons who are, under their provision, bound to elect.

§ 512. Subject to the above-stated limitations, it is a well-settled rule of equity that a person bound to elect has a right to become fully informed of and to know all the facts affecting his choice, and upon which a fair and proper exercise of the power of election can depend. To this end he has a right to inquire into and ascertain all the circumstances connected with the two properties,— that is, his own and the one conferred upon him, and especially their relative condition and value; and he will not be compelled to elect until he has made, or at least has had an opportunity to make, such an examination as enables him to learn the truth.[1] It follows that where an election has been made in ignorance or under a mistake as to the real condition

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[1] Dillon v. Parker, 1 Swanst. 359, 381, and note; 1 Jacob, 505; 1 Clark & F. 303; Wake v. Wake, 1 Ves. 335; Boynton v. Boynton, 1 Brown Ch. 445; Chalmers v. Storil, 2 Ves. & B. 222; Neuman v. Neuman, 1 Brown Ch. 186; Whistler v. Whistler, 2 Ves. 367, 371; Thurston v. Clifton, 21 Beav. 447; Wilson v. Thornbury, L. R. 10 Ch. 239, 248, 249; Douglas v. Douglas, L. R. 12 Eq. 617, 637; Dewar v. Maitland, L. R. 2 Eq. 834, 838; Kreiser's Appeal, 69 Pa. St. 194; United States v. Duncan, 4 McLean, 99; Hall v. Hall, 2 McCord Ch. 269, 280; Snelgrove v. Snelgrove, 4 Desaus. Eq. 274, 300; Pinckney v. Pinckney, 2 Rich. Eq. 219, 237; Upshaw v. Upshaw, 2 Hen. & M. 381, 390; 3 Am. Dec. 632; Reaves v. Garrett, 34 Ala. 563; Bradford v. Kent, 43 Pa. St. 474, 484; Macknet v. Macknet, 29 N. J. Eq. 54; Cox v. Rogers, 77 Pa. St. 160; Waterbury v. Netherland, 6 Heisk. 512; Dabney v. Bailey, 42 Ga. 521; Richart v. Richart, 30 Iowa, 465. In order to enable him to ascertain the facts and to make a proper election in pursuance of the foregoing rule, a party may maintain an equitable suit to have all the necessary accounts of the properties in question taken. See Mr. Swanston's note to Dillon v. Parker, 1 Swanst. 359, 381; citing Butricke v. Broadhurst, 3 Brown Ch. 88; 1 Ves. 171; Pusey v. Desbouverie, 3 P. Wms. 315.

and value of the properties, or under a mistake as to the real nature and extent of the party's own rights, such a mistake is regarded as one of fact, rather than of law; the election itself is not binding, and a court of equitable powers will permit it to be revoked, unless the rights of third persons have intervened which would be interfered with by the revocation.[2] [a] This particular rule must necessarily have

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[2] Dillon v. Parker, 1 Swanst. 359, 381, note; 1 Clark & F. 303; Pusey v. Desbouverie, 3 P. Wms. 315; Wake v. Wake, 3 Brown Ch. 255; Kidney v. Coussmaker, 12 Ves. 136, 152; Snelgrove v. Snelgrove, 4 Desaus. Eq. 27; Hall v. Hall, 2 McCord Ch. 269, 289; Adsit v. Adsit, 2 Johns. Ch. 448, 451; 7 Am. Dec. 539. In Macknet v. Macknet, 29 N. J. Eq. 54, it was held that where an election by a widow of dower, instead of a legacy given in lieu of dower, was made under a mistake as to her rights under the will, and as to the amount which she would receive from the bequest, a court of equity may allow her to revoke her election, where no prejudice would thereby be done to the subsequently acquired rights of others. Such a mistake is of fact, rather than of law.[b] In Cox v. Rogers, 77 Pa. St. 160, a widow had by her conduct unequivocally elected in favor of a legacy given to her in lieu of her dower in a farm which her husband devised to his son. Held, that after a considerable lapse of time the election could not be disturbed, even although made in ignorance of her right. In Waterbury v. Netherland, 6 Heisk. 512, the statutory rule that a widow failing to dissent from her husband's will within the prescribed time is conclusively presumed to have elected to take under the will was held to be compulsory and binding upon a widow. Even where she had been erroneously advised as to the length of the period by one of the executors,— an eminent lawyer,— and had acted upon his opinion in the matter, the maxim, *Ignorantia legis non excusat*, was held to apply. In Dabney v. Bailey, 42 Ga. 521, it was held that a widow who had elected to take a legacy instead of dower, under the erroneous supposition that her husband's estate is solvent, may, on discovering it to be insolvent, revoke her election, and claim her dower. In Richart v. Richart, 30 Iowa, 465, the husband's will gave his widow one third of the real estate in lieu of dower. She elected to take this gift, in consideration that all the heirs should agree to release and assign to her in addition one third of the personal estate. A part only of the heirs finally consenting to this arrangement, she was held not bound by her election, but that she could relinquish the testamentary

(a) The text is cited to this effect in Pratt v. Douglas, 38 N. J. Eq. 516, 539; Standard Oil Co. v. Hawkins, 74 Fed. 395, 20 C. C. A. 468, 33 L. R. A. 739, 46 U. S. App. 115; In re Wickersham's Estate, 138 Cal. 355, 363, 70 Pac. 1076. See, also, Austell v. Swan, 74 Ga. 278; Hill v. Hill, 62 N. J. L. 442, 41 Atl. 943; Elbert v. O'Neill, 102 Pa. St. 302; Woodburn's Estate, 138 Pa. St. 606, 21 Am. St. Rep. 932, 21 Atl. 16; Payton v. Bower, 14 R. I. 375.

(b) To a similar effect, see Evans's Appeal, 51 Conn. 435.

been materially modified by the statutes in many states, which declare in positive terms that an election by widows can only be made within a certain prescribed period, and that if they suffer the time to elapse without taking any step, they shall be deemed to have elected, or to have abandoned the right of electing; and so the decisions seem to hold.

§ 513. **Time of Election.**—It is almost impossible to separate the matter of time from other circumstances, and from the conduct of the party, so as to arrive at any definite rule. The only question involving the element of time is, What is the period during which the continued acts of the party originally entitled to elect will become binding upon him, either as amounting to an election by conduct, or as amounting to a waiver of the right to elect? Under the purely equitable doctrines, unmodified by statute, there is, as it seems, no limit in point of time to a right to elect, unless it can be shown that injury would result to third persons by delay.[1] Nevertheless it is clear that by the acquiescence

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gift and claim her dower. See also Light v. Light, 21 Pa. St. 407, and Bradford v. Kents, 43 Pa. St. 475, as to an election made under a mistake merely of the party's *legal* rights.[e]

[1] Dillon v. Parker, 1 Swanst. 381, 386; Brice v. Brice, 2 Molloy, 21; Wake v. Wake, 1 Ves. 335; Butricke v. Brodhurst, 3 Brown Ch. 90; 1 Ves. 172; Reynard v. Spence, 4 Beav. 103; Sopwith v. Maugham, 30 Beav. 235. In Wake v. Wake, 1 Ves. 335, a widow had for three years received a legacy and annuity under a will, in ignorance of her rights, and it was held that she had not thereby elected nor lost her right of electing. In Reynard v. Spence, 4 Beav. 103, a widow received, under like circumstances, an annuity for five

(e) In Akin v. Kellogg, 119 N. Y. 441, 23 N. E. 1046, it was held that the provision of the New York statute requiring an election to be made within one year, and declaring that the widow should be deemed to have made election to take under the will, unless within that time she enter upon the land to be assigned to her for dower, or commences proceedings for the assignment thereof, has the effect of a statute of limitations, and she is at once, on the death of the testator, charged with the duty of informing herself, so as to make her election, and that if she delays beyond that time, before bringing her action, the court cannot aid her, although she was ignorant of the extent of her husband's estate, and was induced to omit to take the necessary steps to claim dower by reason of the representations of the executor and of the principal beneficiary under the will as to the value of her dower right.

and delay of the one entitled to elect, third persons may acquire rights in the property originally subject to an election, which equity will not suffer to be disturbed by means of a subsequent election.[2] It seems, on the other hand, that a person having the right to compel an election does not, in general, forfeit the right by a delay in its enforcement.[3] These purely equitable rules, at least so far as they affect widows electing between testamentary benefits and dower, have been greatly modified by legislation in this country. In very many of the states statutes have been passed which prescribe definite periods of time within which the right of election between dower and a provision made by will must be exercised. These statutes are collected and arranged according to their several types in the foot-note.[4]

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years, with the same result. In Sopwith v. Maugham, 30 Beav. 235, a widow, in ignorance of her right of dower, had for sixteen years enjoyed a provision expressly given her by will in lieu of dower; but even after this great lapse of time she was held not to have elected, nor to have waived her right of election.

[2] Tibbitts v. Tibbitts, 19 Ves. 663; Dewar v. Maitland, L. R. 2 Eq. 834.

[3] Spread v. Morgan, 11 H. L. Cas. 588.

[4] In the note under the preceding § 494 I have arranged the states in which statutes have changed the equitable doctrines concerning election between a husband's testamentary gift and dower. In the following states the doctrines of equity seem to be left unaltered, and are applied either to the widow's dower, or to her statutory portion given in place of dower. In most of them, however, a certain period is prescribed within which her election must be made, when such election is necessary.

Connecticut.— Gen. Stats. 1875, p. 377, sec. 4:[a] Widow must, within two months after the expiration of the time limited for the presentation of claims, waive the testamentary gift by a writing. See Lord v. Lord, 23 Conn. 327; Hickey v. Hickey, 26 Conn. 261.

Florida.— Bush's Dig., p. 292, c. 44, sec. 1:[b] Widow may dissent from the will within one year after probate.— N. B. It is possible that the statute may be so construed as to make an election necessary whenever *any* devise or bequest is given to the widow. If so, this state should belong in the first class, under § 494, *ante*.

Iowa.— 1 Miller's Rev. Code, 1880, p. 624, sec. 2452: Widow must elect within six months after notice of the provisions of the will. As to when election is or is not necessary, see Metteer v. Wiley, 34 Iowa, 215; Corriel

(a) *Connecticut.*— Gen. Stats. 1888, sec. 621.

(b) *Florida.*—McClellan's Dig. 1881, p. 475, c. 95, sec. 1.

§ 514. **Mode of Election, Express or Implied — What Conduct Amounts to an Election.**—Independently of the statutes referred to in the foregoing paragraph, which have altered the equitable rules on the subject in very many states, an election may be either express or implied. An express election is made by some single unequivocal act of the party, accompanied by language showing his intention to elect, and the fact of his electing in a positive, unmistakable manner, — as, for example, by the execution of a written instrument

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v. Ham, 2 Iowa, 552; Sully v. Nebergall, 30 Iowa, 339; Clark v. Griffith, 4 Iowa, 405; McGuire v. Brown, 41 Iowa, 650.[c] Election by conduct. See Stoddard v. Cutcompt, 41 Iowa, 329. The statute requires *action* on her part: Kyne v. Kyne, 48 Iowa, 21, 24; and does not apply to personal property: In re Davis's Estate, 36 Iowa, 24.

Kentucky.— Gen. Stats. 1873, p. 373, sec. 12:[d] Election against the will must be within one year after probate. See Dawson v. Hayes, 1 Met. (Ky.) 461; Barnett's Adm'r v. Barnett, 1 Met. (Ky.) 257, 258, 259; Worsley's Ex'r v. Worsley, 16 B. Mon. 470.

New Hampshire.—Gen. Stats. 1867, p. 358, sec. 13: Widow may elect against the will by a writing, but the time within which she must so elect is not prescribed.[e]

New York.— 1 Rev. Stats., p. 741, secs. 13, 14: Widow is deemed to have elected to take under the will, unless within one year after her husband's death she begins proceedings to recover her dower, or enters on the lands assigned for dower. See Lewis v. Smith, 9 N. Y. 504, 511; 61 Am. Dec. 706; Jackson v. Churchill, 7 Cow. 287; 17 Am. Dec. 514; Hawley v. James, 5 Paige, 318, 447; Bull v. Church, 5 Hill, 206; Church v. Bull, 2 Denio, 430; 43 Am. Dec. 754; Leonard v. Steele, 4 Barb. 20.[f]

Rhode Island.— Gen. Stats. 1872, p. 374, sec. 11:[g] Widow must elect against the will by a writing within one year after probate.

Vermont.— Gen. Stats. 1862–70, p. 412, secs. 5, 6:[h] Widow may elect within eight months after probate.

(c) *Iowa.*— McClain's Code 1888, sec. 3656. See, also, Potter v. Worley, 57 Iowa, 66, 7 N. W. 685, 10 N. W. 298; Blair v. Wilson, 57 Iowa, 148, 10 N. W. 327; Snyder v. Miller, 67 Iowa, 261, 25 N. W. 240; Daugherty v. Daugherty, 69 Iowa, 679, 29 N. W. 778; Estate of Blaney, 73 Iowa, 114, 34 N. W. 768; Howard v. Watson, 76 Iowa, 229, 41 N. W. 45.

(d) *Kentucky.*— Gen. Stats. 1887, c. 31.

(e) *New Hampshire.*— If an election is necessary, it must be made seasonably; Hovey v. Hovey, 61 N. H. 599.

(f) *New York.*— 4 Rev. Stats., 8th ed., p. 2455. See Akin v. Kellogg, 119 N. Y. 441, 23 N. E. 1046 (has effect of a statute of limitations).

(g) *Rhode Island.*— Pub. Stats. 1882, p. 472, sec. 11.

(h) *Vermont.*— Rev. Laws 1880, sec. 2219.

declaring the election. As the election becomes fixed by such a definite act, and at such precise time, no questions concerning it can arise.

§ 515. **Implied.**— An election may also be implied — that is, inferred — from the conduct of the party, his acts, omissions, modes of dealing with either property, acceptance of rents and profits, and the like. Courts of equity have never laid down any rule determining for all cases what conduct shall amount to an implied election, but each case must depend in great measure upon its own circumstances.[1] The following rules, however, have been fairly settled by the courts as guides in determining the general question. To raise an inference of election from the party's conduct merely, it must appear that he knew of *his right to elect,* and not merely of the instrument giving such right,[2] and that he had full knowledge of all the facts concerning the properties.[3] As an election is necessarily a definite choice by the party to take one of the properties and to reject the other, his conduct, in order that an election may be inferred, must be done with an intention to elect, and *must show such an intention.* The intention, however, may be inferred from a series of unequivocal acts.[4][a] In applying these general rules, the following particular conclusions as to what conduct may or may not amount to an election seem to have been definitely reached: Where a person, bound to elect between two properties, continues in possession, or enjoyment, or receipt of the rents and profits of both, without being called upon by the other party interested to elect, this conduct indicates no intention of taking one and rejecting the other, and does not therefore amount to an election.[5][b] Taking the interest or income of one fund or property only is, in general, an election to take the fund or property producing the interest or income.[6] Settling one of two funds, between which the settlor is bound to elect, is an election to take the fund so settled.[7] Suffering a recovery of lands devised in tail is an election to take those lands.[8] A recital in a deed may amount to an election or be evidence of an election.[9] I have collected in the foot-note the important cases which deal with the question of an election implied from the conduct of the party who is entitled or bound to elect.[10] The rule seems to be plainly deducible from the American cases which are placed in the note, that where a widow is required to elect between a testamentary provision in her favor and her dower, any unequivocal act of dealing with the property given by the will as her own, or the exercise of any unmistakable act of ownership over it, if done with knowledge of her right to elect, and not through a clear mistake as to the condition and value of the property, will be deemed an election by her to take under the will, and to reject her dower.[d]

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[1] See note to Dillon v. Parker, 1 Swanst. 359, 381, 382, and cases there cited; Padbury v. Clark, 2 Macn. & G. 298, 306, 307; Whitridge v. Parkhurst, 20 Md. 62, 72. In Padbury v. Clark, 2 Macn. & G. 298, Lord Cottenham said: "If a party, being bound to elect between two properties, not being called upon so to elect by the other parties interested, continues in the receipt of the rents and profits of *both,* such receipt, affording no proof of preference, cannot be an election to take the one and reject the other; and so if the other property be under circumstances that it does not yield rent to be received by the party liable to elect, but such party, particularly if with the knowledge and consent of the one who is entitled to call for such election, deal with this property as his own, it would seem that such acts ought to be equally unavailable to prove an actual election; for in both cases there is, as far as circumstances will admit, an equal dealing with the two properties, and therefore an absence of proof of any intention to elect the one and reject the other."

[2] Edwards v. Morgan, 1 Bligh, N. S., 401; Briscoe v. Briscoe, 1 Jones & L. 334, 7 I. R. Eq. 123; Sweetman v. Sweetman, 2 I. R. Eq. 141.

[3] Sopwith v. Maugham, 30 Beav. 235; Worthington v. Wigginton, 20 Beav. 67; and see *ante,* § 512, and cases cited in note.

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[4] Spread v. Morgan, 11 H. L. Cas. 588; Dillon v. Parker, 1 Swanst. 359, 380, 387; Padbury v. Clark, 2 Macn. & G. 298, 306, 307; Worthington v. Wigginton, 20 Beav. 67; Campbell v. Ingilby, 21 Beav. 582; Stratford v. Powell, 1 Ball & B. 1; Edwards v. Morgan, McClel. 541, 13 Price, 782, 1 Bligh, N. S., 401.

[5] Padbury v. Clark, 2 Macn. & G. 298, 306, 307; Spread v. Morgan, 11 H. L. Cas. 588; Whitridge v. Parkhurst, 20 Md. 62, 72.

[6] Ardesoife v. Bennett, 2 Dick. 463; Dewar v. Maitland, L. R. 2 Eq. 834.

[7] Briscoe v. Briscoe, 1 Jones & L. 334.

[8] Giddings v. Giddings, 3 Russ. 241.

[9] Dillon v. Parker, 1 Jacob, 505; 1 Clark & F. 303.

[10] Dillon v. Parker, 1 Swanst. 359, 381, 382, and note; Wilson v. Thornbury, L. R. 10 Ch. 239, 248, 249; Dewar v. Maitland, L. R. 2 Eq. 834; Padbury v. Clark, 2 Macn. & G. 298; Brice v. Brice, 2 Molloy, 21; Giddings v. Giddings, 3 Russ. 241; Miller v. Thurgood, 33 Beav. 496; Fitzsimmons v. Fitzsimmons, 28 Beav. 417; Honeywood v. Forster, 30 Beav. 14; Howells v. Jenkins, 2 Johns. & H. 706; 1 De Gex, J. & G. 617; Spread v. Morgan, 11

(a) The text is quoted and the rules there stated adopted, in Burroughs v. De Couts, 70 Cal. 371, 11 Pac. 734; In re Smith, 108 Cal. 115, 120, 40 Pac. 1037; and cited, in Morse v. Hackensack Sav. Bk., 47 N. J. Eq. 279, 20 Atl. 961, 12 L. R. A. 62.

(b) The text is cited to this effect in Madden v. Louisville, N. O. & T. R'y Co., 66 Miss. 258, 6 South. 181.

§ 516. Effects of an Election.— The effects of an election when once made are to be considered with reference to two different classes of persons, namely, those who succeed, or represent, or derive title from the party making the election, and those who are originally interested in the prop-

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H. L. Cas. 588; Reynard v. Spence, 4 Beav. 103; Sopwith v. Maugham, 30 Beav. 235; Wake v. Wake, 1 Ves. 335; Butricke v. Brodhurst, 3 Brown Ch. 90; 1 Ves. 172; Tibbitts v. Tibbitts, 19 Ves. 663; Whitridge v. Parkhurst, 20 Md. 62, 72; Marriott v. Sam Badger, 5 Md. 306; Upshaw v. Upshaw, 2 Hen. & M. 381; 3 Am. Dec. 632; Caston v. Caston, 2 Rich. Eq. 1; Binst v. Dawes, 3 Rich. Eq. 281; Bradford v. Kent, 43 Pa. St. 474, 484; Anderson's Appeal, 36 Pa. St. 476; Adlum v. Yard, 1 Rawle, 163, 171; 18 Am. Dec. 608; Heron v. Hoffner, 3 Rawle, 393, 396; Cauffman v. Cauffman, 17 Serg. & R. 16, 25; Wilson v. Hamilton, 9 Serg. & R. 424; O'Driscoll v. Koger, 2 Desaus. Eq. 295, 299; Snelgrove v. Snelgrove, 4 Desaus. Eq. 274, 300; Shaw v. Shaw, 2 Dana, 342; Clay v. Hart, 7 Dana, 1, 6; Watkins v. Watkins, 7 Serg. 283; Reaves v. Garrett, 34 Ala. 563; Kinnaird v. Williams's Adm'r, 8 Leigh, 400; 31 Am. Dec. 658; Stark v. Hunton, 1 N. J. Eq. 217, 227; Sloan v. Whitaker, 58 Ga. 319; Sewell v. Smith, 54 Ga. 567; Stoddard v. Cutcompt, 41 Iowa, 329; Cox v. Rogers, 77 Pa. St. 160; Camden Mut. Ins. Co. v. Jones, 23 N. J. Eq. 171; Crocker v. Beal, 1 Low. 416.[c]

(c) See, also, Estate of Stewart, 74 Cal. 98, 15 Pac. 445; Estate of Smith, 108 Cal. 115, 121, 40 Pac. 1037; Churchill v. Bee, 66 Ga. 621; Johnston v. Duncan, 67 Ga. 61; Forester v. Watford, 67 Ga. 508; Cunningham's Estate, 137 Pa. St. 621, 21 Am. St. Rep. 901, 20 Atl. 714; Payton v. Bowen, 14 R. I. 375; Penn v. Guggenheimer, 76 Va. 839; Cooper v. Cooper, 77 Va. 198.

(d) The text is quoted in Penn v. Guggenheimer, 76 Va. 839, 850; Burroughs v. De Couts, 70 Cal. 361, 11 Pac. 734; In re Smith, 108 Cal. 115, 121, 40 Pac. 1037 (no election manifested). A widow, by becoming executrix of her husband's will, is not thereby estopped to afterwards make an election: Estate of Gwin, 77 Cal. 313, 19 Pac. 527; Pratt v. Douglas, 38 N. J. Eq. 516, 538; Benedict v. Wilmarth (Fla.), 35 South. 84.

erty subject to the election by reason of being beneficiaries under the instrument of donation, and whose interests are therefore directly affected by the election. Where an election is once made by the party bound to elect, either expressly or inferred from his conduct, it binds not only himself, but also those parties who claim under him, his representatives and heirs.[1] [a] Wherever the person bound to elect is entitled only to a life estate in the property, or to any other prior interest, his election does not bind the one entitled in remainder to the same property.[2] And where several individuals constituting a class — as the next of kin — are entitled to elect, each has a separate right of election; an election by any of them does not affect the rights of others.[3]

§ 517. The other parties interested as donees under the instrument creating the necessity for an election are affected by it, when made, in the following manner: If the person on whom the duty of electing rests elects to take in conformity with the will or other instrument of donation, he thereby relinquishes his own property, and must release or convey it to the donee upon whom the instrument had assumed to confer it.[a] If he elects against the will or other instrument of donation, he thereby retains his own property, and must compensate the disappointed donee out of the estate given to himself by the donor. A court of equity will then sequester the benefits intended for the electing beneficiary, in order to secure compensation to those persons whom his election disappoints.[1] [b] This rule is applied in many of the American cases cited below to elections made by widows in favor of their dower and against the testamentary provisions, whereby the interests of other devisees were disturbed. Such disappointed devisees are held entitled to compensation out of the benefits intended to be conferred by the will on the widow, but which she had rejected.

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[1] Earl of Northumberland v. Earl of Aylesford, Amb. 540, 657; Dewar v. Maitland, L. R. 2 Eq. 834; Stratford v. Powell, 1 Ball & B. 1; Ardesoife v. Bennett, 2 Dick. 463; and see, with respect to acts binding upon the representatives, Tomkyns v. Ladbroke, 2 Ves. Sr. 593; Worthington v. Wiginton, 20 Beav. 67; Sopwith v. Maugham, 30 Beav. 235, 239; Whitley v. Whitley, 31 Beav. 173. Where the party bound to elect has not definitely elected in his lifetime, his representatives who have accepted benefits under the instrument of donation, but have not themselves explicitly elected, may, if they can offer compensation, and can place the other party in the same situation as if such benefits had not been accepted, renounce those benefits, and determine the question of election for themselves: Dillon v. Parker, 1 Swanst. 385; Moore v. Butler, 2 Schoales & L. 268; Tysson v. Benyon, 2 Brown Ch. 5.

[2] Ward v. Baugh, 4 Ves. 623; Long v. Long, 5 Ves. 445; and see Hutchinson v. Skelton, 2 Macq. 492, 495.

[3] Fytche v. Fytche, L. R. 7 Eq. 494; Ward v. Baugh, 4 Ves. 623.

§ 516, (a) The text is quoted in Penn v. Guggenheimer, 76 Va. 839, 851.

§ 517, (a) But without such release or conveyance the donee obtains only an equitable interest in the property of the person who has made the election; an interest which may be defeated by a conveyance of the legal

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[1] See this rule discussed *ante*, in §§ 467, 468; Gretton v. Haward, 1 Swanst. 409, 423, 433, and note by Mr. Swanston; Rogers v. Jones, 3 Ch. Div. 688, 689; Pickersgill v. Rodger, 5 Ch. Div. 163, 173; Howells v. Jenkins, 1 De Gex, J. & S. 617, 619; Spread v. Morgan, 11 H. L. Cas. 588; Streatfield v. Streatfield, Cas. t. Talb. 176; Bor v. Bor, 3 Brown Parl. C., Tomlins's ed., 167; Ardesoife v. Bennett, 2 Dick. 465; Lewis v. King, 2 Brown Ch. 600; Freke v. Barrington, 3 Brown Ch. 284; Whistler v. Webster, 2 Ves. 372; Ward v. Baugh, 4 Ves. 627; Lady Caven v. Pulteney, 2 Ves. 560; Blake v. Bunbury, 1 Ves. 523; Welby v. Welby, 2 Ves. & B. 190, 191; Dashwood v. Peyton, 18 Ves. 49; Tibbitts v. Tibbitts, Jacob, 317; Lord Rancliffe v. Parkyns, 6 Dow, 179; Ker v. Wauchope, 1 Bligh, 25; Padbury v. Clark, 2 Macn. & G. 298; Greenwood v. Penny, 12 Beav. 403; Codrington v. Lindsay, L. R. 8 Ch. 578; Griggs v. Gibson, L. R. 1 Eq. 685; Palmer v. Wakefield, 3 Beav. 227; Giddings v. Giddings, 3 Russ. 241; Cauffman v. Cauffman, 17 Serg. & R. 16, 24, 25; Philadelphia v. Davis, 1 Whart. 490, 502; Stump v. Findlay, 2 Rawle, 168, 174; 19 Am. Dec. 632; Lewis v. Lewis, 13 Pa. St. 79, 82; 53 Am. Dec. 443; Van Dyke's Appeal, 60 Pa. St. 490; Sandoe's Appeal, 65 Pa. St. 314; Key v. Griffen, 1 Rich. Eq. 67; Marriott v. Sam Badger, 5 Md. 306; Maskell v. Goodall, 2 Disn. 282; Roe v. Roe, 21 N. J. Eq. 253; Estate of Delaney, 49 Cal. 77; Tiernan v. Roland, 15 Pa. St. 430, 451; Wilbanks v. Wilbanks, 18 Ill. 17; Jennings v. Jennings, 21 Ohio St. 56; Allen v. Hannum, 15 Kan. 625.

estate to a *bona fide* purchaser. The statutory notice of an election to take under the will does not operate as a conveyance. See Hibbs v. Insurance Co., 40 Ohio St. 543. When a beneficiary under a will is put to an election between the gift and a claim against the estate, his acceptance of the gift is a satisfaction of the claim, and it is immaterial whether what he takes turns out to be of greater or less value than his claim: Caulfield v. Sullivan, 85 N. Y. 153. See, also, Lee v. Tower, 124 N. Y. 370, 26 N. E. 943.

(b) The text is cited to this effect in Brown v. Brown, 42 Minn. 270, 44 N. W. 250.

§ 518. **Equitable Jurisdiction in Matters of Election.**— In England, where the original general jurisdiction over the administration of decedents' estates is still preserved, the question of election under the provisions of a will usually arises as an incident of the administration, and thus comes within the cognizance of the court as a part of or a step in the administration. In the American states, the power to entertain a suit for the purpose of compelling an election may, perhaps, be sustained as one of those special matters connected with administrations which have not been surrendered to the statutory courts of probate, and which are still retained by courts of equity. Whether this be so or not, it is well settled that, wholly independent of the general power over administrations, an equitable jurisdiction exists to entertain a suit on behalf of the other parties interested as beneficiaries against the donee upon whom the duty of electing is imposed by the instrument of donation, for the purpose of compelling him to make an election. The jurisdiction to entertain such a suit embraces the power to determine whether the necessity for an election exists, and after the election is actually made, to ascertain, adjust, and secure the rights of all the parties interested which are affected by it, by means of compensation or otherwise. This special jurisdiction has sometimes been referred to that existing over trusts, because, when the election is made by the defendant, a trust in favor of the plaintiff is impressed upon the property rejected.[1]

§ 519. Conversely, the rule has been stated in the most general manner, that the jurisdiction always exists, and will be exercised, to entertain a suit on behalf of the person bound to elect, for the purpose of having the necessary accounts taken, so that he may be informed of the real value and condition of the property and enabled to exercise his right of election in a proper manner. The latest English decision on this subject, however, while conceding that such a jurisdiction will be exercised under all ordinary circumstances, holds that in certain special cases the suit would not be maintained.[1] In several of the American states, where the general doctrines of equity concerning the election by widows between their dower and a testamentary provision have been greatly modified by statute, and definite statutory rules have been substituted in their stead, as shown in a previous paragraph, the courts of probate have jurisdiction to determine all *such* matters of election, and to decide upon the rights of widows and other parties interested, in the ordinary proceedings for administering, settling, and distributing the estate, or in the proceedings for assigning the widow's dower. This purely statutory jurisdiction does not, however, seem to embrace other and more general cases calling for an election.

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[1] Many of the cases heretofore cited in this section were suits of such a nature brought to enforce an election. See Douglas v. Douglas, L. R. 12 Eq. 617, 637; Dillon v. Parker, 1 Swanst. 381, note by Mr. Swanston; Van Dyke's Appeal, 60 Pa. St. 481, 489, per Sharswood, J.

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[1] Dillon v. Parker, 1 Swanst. 381, note by Mr. Swanston; Butricke v. Broadhurst, 3 Brown Ch. 88; 1 Ves. 171, 172, per Lord Thurlow; Pusey v. Desbouverie, 3 P. Wms. 315; Douglas v. Douglas, L. R. 12 Eq. 617, 637, per Wickens, V. C. In this last case, the court said (p. 637): "It is perhaps too broadly stated by Lord Thurlow, in Butricke v. Broadhurst, 3 Brown Ch. 88, whose *dictum* has been adopted by Mr. Swanston in his note to Dillon v. Parker, 1 Swanst. 381, that the court of chancery will in *all* cases entertain a suit by a person put to an election to ascertain the value of the objects between which election is to be made. No doubt there is, in almost all cases, jurisdiction in equity to compel a final election, so as to quiet the title of those interested in the objects of which one is to be chosen; and the court, as a condition of compelling such a final election, secures to the person compelled to make it all the information necessary to guide him in doing so. It is also generally, though perhaps not universally, true that a person for whose benefit conditions will be imposed by the court before it makes an order against him can entitle himself to the benefit of the conditions by filing a bill and offering by it to submit to the order." So far as these remarks tend to restrict the jurisdiction, they are confessedly a mere *dictum*, not at all necessary to the actual decision made in the case.

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